(26,077)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 610.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, PLAINTIFF IN ERROR,

vs.

MARY OPPERMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

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a STATE OF INDIANA:

In the Appellate Court.

Be it remembered that heretofore to wit: On the 11th day of August, 1913, the same being the 67th Judicial Day of the May Term of said Appellate Court, 1913, The Citizens Bank of Michigan City, Indiana, by its attorneys, Collins and Drummond & Drummond, filed in the office of the Clerk of said Supreme and Appellate Court of said State of Indiana a transcript of the record and proceedings had in the St. Joseph Superior Court of said State of Indiana in a cause wherein the Citizens Bank of Michigan City, Indiana was the appellant, and Mary Opperman was the appellee, together with an assignment of errors in term bond by appellant, wherein Osborn, McVey & Osborn and Anderson, Parker, Crabill & Crumpacker appeared as attorneys for Appellee, Mary Opperman.

b In the Appellate Court of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA

vs.

MARY OPPERMAN.

Be it remembered, that on to-wit: August 9th, 1913, the said Appellant filed in the office of the Clerk of said Court its transcript in the words and figures, following:

1 *Assignment of Errors.*

STATE OF INDIANA:

In the Appellate Court.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

Assignment of Errors.

The appellant avers that there is manifest error in the proceedings and judgment in said cause in this, to wit:

1. The Court erred in sustaining the appellee's demurrer to the amended second paragraph of appellant's answer.

2. The Court erred in overruling appellant's motion to modify the judgment herein.

3. The court erred in overruling appellant's motion for a new trial.

COLLINS & COLLINS,
DRUMMOND & DRUMMOND,
Attorneys for Appellant.

Filed Aug. 11, 1913. J. Fred France, Clerk.

2 Pleas Began and Held at the Court-house in the City of La Porte, in the County of La Porte and State of Indiana, on Monday the 9th Day of May, 1910, Before the Honorable John C. Richter, Judge of the Thirty-second Judicial Circuit of the State of Indiana and ex-Officio Judge of the La Porte Circuit Court.

STATE OF INDIANA,
County of La Porte, ss:

In the La Porte Circuit Court, May Term, 1910.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, INDIANA.

And, be it remembered, that heretofore to wit, on the 27th day of July, 1905, there came to the office of the Clerk of said Court the plaintiff herein, by Osborn, McVey & Osborn, her attorneys and filed her complaint herein, as follows, to wit:

Complaint.

STATE OF INDIANA,
County of La Porte, ss:

In the La Porte Circuit Court, May Term, 1905.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, INDIANA.

Complaint for Replevin.

The said plaintiff complains of said defendant and says: That she, the said plaintiff, is the owner, and entitled to the possession of one Certificate, No. 385 for fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana, of the
3 face value of fifteen hundred Dollars ($1500.00) dated August 20th, 1904, issued to and in the name of Mary Opperman, which said certificate is of the value of Twenty five

Hundred Dollars ($2500.00) and of which the said defendant has possession, without right and unlawfully detains from this plaintiff, to plaintiff's damage in the sum of Fifteen Hundred Dollars ($1500.00).

Wherefore, plaintiff demands judgment for the possession of said property and Fifteen Hundred Dollars ($1500.00) for the detention thereof, and for all other proper relief.

OSBORN, McVEY & OSBORN,
Attys. for Plff.

Affidavit.

STATE OF INDIANA,
County of La Porte, ss:

In the La Porte Circuit Court, May Term, 1905.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, INDIANA

Frank E. Osborn, being duly sworn upon his oath says that he is one of the attorneys for the plaintiff in the above entitled cause, and that the said plaintiff, Mary Opperman, is the owner of Certificate No. 385 for fifteen Shares of the capital stock of the First National Bank of Michigan City, Indiana, of the face value of Fifteen Hundred Dollars ($1500.00) issued to and i nthe name of Mary Opperman, and dated August 20th, 1904, and that she is lawfully entitled to the possession thereof, and that the same has not
4 be- taken for any tax assessment or fine pursuant to any statute or seized under any execution or attachment against the property of said plaintiff, and that said property is unlawfully detained from said plaintiff by the said defendant and is of the estimated value of Twenty Five Hundred Dollars ($2500.00) and is so detained in the County of La Porte, in the State of Indiana, as affiant is informed and believes.

FRANK E. OSBORN.

Subscribed and sworn to before me this 26th day of July, 1905.

MATE G. LINE,
Notary Public.

My Commission Expires Oct. 27, 1907.

And, be it remembered, that afterwards, to wit, on the 29th day of September, 1905, the same being the 5th judicial day of the September Term, 1905, of said Court, begun and held as aforesaid and before the Judge aforesaid, the following further proceedings were had in said cause, to-wit:

"6437.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, IND.

Come now the parties, and the defendant files its answer in these words as follows, to wit:

Answer of Defendant.

STATE OF INDIANA,
La Porte County, ss:

In the La Porte Circuit Court.

5–9 No. 6437.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, IND.

The defendant for answer to the plaintiff's complaint says: That it denies each material allegation thereof.

JAMES GALLAHER,
Atty. for Def.

10 And, be it remembered, That afterwards, towit, on the 24th day of June, 1912, the same being the 25th Judicial day of the May Term, 1912 of the St. Joseph Superior Court, began and held before the Honorable Vernon W. Van Fleet, Judge of the Judicial Circuit composed of the Counties of St. Joseph and Elkhart, and ex-officio Judge of the St. Joseph Superior Court, of St. Joseph County, State of Indiana, the following further proceedings were had in the above entitled cause, to wit:

#799.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, INDIANA.

Replevin.

Come now the parties herein in person and by counsel and the defendant now files with the Court its amended second paragraph of answer which is in these words as follows, to wit:

Amended Second Paragraph of Answer.

STATE OF INDIANA,
St. Joseph County, ss:

In the St. Joseph Superior Court.

No. 799.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, INDIANA.

Amended Second Paragraph of Answer.

Par. II. For a further and second paragraph of answer to plaintiff's complaint herein the defendant alleges that in the month of September, 1904, Henry A. F. Opperman, the husband of the plaintiff, was indebted to the defendant, the Citizens Bank
11 of Michigan City, Indiana, in the sum of thirty Six Hundred and Thirty Dollars evidenced by three promissory notes for $2,000, $1,000 and $630 respectively.

That said notes were about to mature and the said defendant bank informed the said Henry A. F. Opperman that payment would be demanded and enforced at the maturity of each note. That to secure an extension of the time for the payment of said notes the said Henry A. F. Opperman delivered to said defendant bank as collateral security for the payment of said notes a certain certificate of stock No. 385 for fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana, as hereinafter set forth. That the said First National Bank of Michigan City, by which said certificate of stock No. 385 was issued, as aforesaid, was at the time said certificate was issued and ever since has continued to be a corporation, organized and doing business under and by virtue of the banking laws of the United States of America. That said certificate was issued to and in the name of the plaintiff herein and prior to the time when said certificate was delivered by the said Opperman to this defendant as aforesaid, and on some date to this defendant unknown, the plaintiff signed in blank the form of assignment and power of attorney printed on the back of said certificate without endorsing thereon any restrictive conditions and delivered the same to her said husband, Henry A. F. Opperman, and that at
12 the time when the said certificate was delivered to the defendant by the said Henry A. F. Opperman the printed transfer and power of attorney on the back thereof had been executed by the plaintiff, and that at said time the said Henry A. F. Opperman represented to defendant that he was the owner of said certificate and defendant had no notice or knowledge that plaintiff had or claimed to have any interest in said stock certificate. A copy

of the said certificate and the assignment thereof being filed herewith and made a part of this answer and marked Exhibit "A."

That defendant relying upon the fact that the said certificate was properly assigned without restriction, and in the possession of the said Henry A. F. Opperman and having no notice or knowledge of any claims of any interest therein on the part of the plaintiff, accepted said certificate as collateral security to his said notes and in consideration thereof it granted to the said Henry A. F. Opperman the right to renew his said note for $630. for sixty days and to renew his note for $1,000. for thirty days and to renew his note for $2,000. for thirty days and further relying on said stock certificate as security for said notes this defendant allowed said Opperman to again renew said notes from time to time until the Spring of the year 1905 when the said Opperman became wholly insolvent and made an assignment for the benefit of his creditors, and has ever since continued to be and is now insolvent.

13 That the debt evidenced by said notes is still unpaid except as to the sum of $931 paid by the assignee of said Opperman as a dividend to his creditors from his estate. That said Henry A. F. Opperman is now wholly insolvent and said debt cannot be recovered from him.

That at the time when said stock certificate was placed with defendant as collateral security the said Henry A. F. Opperman executed a collateral agreement, a copy of which is filed herewith and marked Exhibit "B" and made a part hereof and that this defendant never had any other contract of suretyship relating to said stock certificate No. 385, and never had any contract of suretyship of any kind with the plaintiff herein.

Wherefore defendant says that plaintiff should be estopped to set up any claim to said certificate as against it and demands judgment.

(Signed) C. R. & J. B. COLLINS,
DRUMMOND & DRUMMOND,
Deft's Attorneys.

EXHIBIT "A."

State of Indiana.

385.

Capital Stock $125,000.00.
Shares $100.00 each.

First National Bank of Michigan City, Indiana.

This is to certify that Mary Opperman is entitled to fifteen
14 shares of the Capital Stock of the First National Bank of Michigan City, Indiana, subject to the provisions of the National Banking act, approved June 3rd, A. D. 1864, and amendments thereto. Transferable only on the books of the bank, in person or by attorney on the surrender of this Certificate.

In Witness Whereof, the President and Cashier have hereunto subscribed their names and caused the seal of this Bank to be affixed at Michigan City, Ind., 20th day of August, A. D. 1904.

FIRST NATIONAL BANK OF MICHIGAN CITY, IND.

[SEAL.] WALTER VAIL, *President.*

J. F. KREIDLER, *Cashier.*

On the reverse side:

For value received — hereby sell, transfer and assign to —— —— the shares of Stock within mentioned and authorize — to make the necessary transfer on the books of the bank.

Witness — hand and seal this — day of —— 190-.

MARY OPPERMAN.

Witnessed by
MARY OPPERMAN.

15 EXHIBIT "B."

This is to certify, That the undersigned has deposited with t Citizens Bank of Michigan City, Indiana, the following described personal property, to wit:

Certf. No. 385 Capt. Stock of the First Nat. Bank of Michigan City, to be held by said Bank as collateral security for the payment of any and all sums, however evidence-, whether by promissory note, draft, overdraft or otherwise, whether as maker, indorser or surety now owing or which may hereafter by owing to said Bank by the undersigned, either individually or jointly, or jointly and severally with any other person or persons, to include any and all renewals or promissory notes or new promissory notes or other obligations accepted in payment of former obligations.

The said Bank, or its assigns, shall have full power and authority upon the maturity of any obligation secured by said collateral, or at any time, thereafter or before, at its discretion, or in the event of said securities or any of them depreciating in value, to collect or otherwise convert said securities, or either or any part of them or any substitutes therefor, or any additions thereto, or to sell the same, or any part thereof, at public or private sale, at the discretion of said Bank, without advertising the same or otherwise giving public notice or to the undersigned (and the said bank may become the purchaser at public sale). The said Bank shall apply the proceeds
16 realized from said collateral or any part thereof so collected, converted or sold, after the payment of all expenses and attorney's fees attending said collection conversion or sale thereof, to the payment of any obligation secured thereby, with all interest due thereon, and return the overplus, if any, to the undersigned. In case the proceeds of said collection or sale of said collateral security shall not cover the principal, interest and expenses, the undersigned promises to pay the deficiency forthwith; all sales or other disposition

of said collateral to be without relief from valuation or appraisement laws.

The undersigned waives all claims or defenses on the ground of lack of diligence of the said bank in making collection of said collateral, or sale, or conversion thereof, and it shall not be bound to so proceed, unless directed in writing so to do by the undersigned.

Dated at Michigan City, this 19th day of Sept., 1904.

H. A. F. OPPERMAN.

And the plaintiff now files her demurrer to the defendant's amended second paragraph of answer which demurrer is in these words as follows, to wit:

Demurrer to Second Paragraph of Answer.

STATE OF INDIANA,
County of St. Joseph, ss:

St. Joseph Superior Court, May Term, 1912.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, IND.

Demurrer to 2nd Par. of Ans.

17 Comes now the Plaintiff and demurs to defendant's amended second paragraph of answer herein, and for ground of demurrer says, that said paragraph of answer does not state facts sufficient to constitute a cause of defense to plaintiff's complaint and to the cause of action stated in plaintiff's complaint.

OSBORN, McVEY AND OSBORN,
Attys. for Plff.

And be it remembered, that afterwards, to-wit, on the 14th day of November, 1912, the same being the 34th Judicial Day of the October Term, 1912, of the St. Joseph Superior Court, began and held as aforesaid and before the Judge aforesaid, the following further proceedings were had in the above entitled cause, to-wit:

Demurrer & Amended 2nd Paragraph of Answer Sustained.

#799.

MARY OPPERMAN

vs.

CITIZENS NATIONAL BANK OF MICHIGAN CITY, INDIANA.

Come now the parties herein by counsel, and the demurrer to the amended 2nd paragraph of answer is now sustained by the court, to which ruling of the court the defendant excepts.

18 And, be it remembered, that afterwards, to-wit: on the 16th day of January, 1913, the same being the 22nd Judicial day of the December Term, 1912, of the St. Joseph Superior Court, began and held as aforesaid and before the Judge aforesaid, the following further proceedings were had in the above entitled cause, to-wit:

#799.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, INDIANA.

Come now the parties in person and by counsel and the evidence in this cause is now closed and defendant now orally moves the court to instruct the Jury to return a verdict for the defendant, to which the plaintiff objects, which motion is now overruled by the court, to which ruling of the court the defendant excepts, and now the defendant is granted sixty days in which to file a bill of exceptions and now *parties* files a written request that the court instruct the Jury in writing, which request is in the words and figures following, to-wit:

18½ *Defendant's Request for Instructions.*

STATE OF INDIANA,
St. Joseph County, ss:

In the St. Joseph Superior Court, 1911.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY.

Request for Instructions.

Now at the close of the introduction of evidence, and before argument, the defendant, Citizens Bank of Michigan City, requests the court to instruct the jury, in writing, and tenders to the court 24 written instructions, numbered from One to Twenty-four inclusive, and requests the court to give them, and each of them separately and severally to the jury, as a part of the instructions to the jury, and to now indicate before argument which of said instructions so tendered by the defendant will be given and which are refused.

DRUMMOND & DRUMMOND AND
C. R. & J. B. COLLINS,
Attorneys for Defendant.

19 *Plaintiff's Request for Instructions.*

STATE OF INDIANA,
St. Joseph County, ss:

In the St. Joseph Superior Court, 1911.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY.

Request for Instructions.

Now at the close of the introduction of evidence, and before argument, the plaintiff, Mary Opperman, requests the court to instruct the jury, in writing, and tenders to the court 15 written instructions, numbered from One to Fifteen inclusive, and requests the court to give them, and each of them separately and severally to the jury, as a part of the instructions to the jury, and to now indicate before argument which of said instructions so tendered by the plaintiff will be given and which are refused.

OSBORN, McVEY & OSBORN,
ANDERSON, PARKER, CRABILL &
CRUMPACKER,
Attys. for Plaintiff.

20 *Indication by Court of Instructions It Would Give, Exception by the Appellant, and Time Given to File Bill of Exceptions.*

The Court indicates before argument that it will give all of instructions, fifteen in number, asked by plaintiff, and that it will give all the instructions asked for by defendant except instructions numbered 5-10-16-17-18-21-22-23-24 of defendants, which the court refuses to give, and to which refusal of the Court, the defendant excepts as to each of the instructions refused, and thirty days *is* now given to defendant to file a bill of exceptions, and plaintiff excepts separately to the giving of each of defendant's instructions asked for by defendant and given by the court, and sixty days *is* now given plaintiff in which to file bill of exceptions, and defendant excepts to the action of the court in giving of each of plaintiff's instructions, and defendant is given thirty days in which to file a bill of exceptions; and now the jury is instructed in writing by the court, and now all instructions
21 given and refused are signed and filed and made a part of the record, which instructions are as follows, to wit:—

Instruction 1.

This is an action brought by the plaintiff, Mary Opperman, against the defendant, Citizens Bank of Michigan City, Indiana, to recover

the possession of Certificate No. 385 for fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana. It is alleged in part in the complaint that the plaintiff is the owner and entitled to the possession of said certificate, and that the defendant at the commencement of this action had possession of said Certificate without right, and unlawfully detained the same.

In the defendant's answer it denies the allegations of the plaintiff's complaint.

Given.

Instruction 2.

The burden of proving all the material facts alleged in plaintiff's complaint rests upon the plaintiff, and she must establish such facts by a fair preponderance of all the evidence.

Given.

Instruction 3.

By a fair preponderance of the evidence is meant, not the mere number of witnesses upon one side or the other, but that evidence which is most convincing and satisfying to the mind of the jury, and in determining upon which side the preponderance of the evidence is, the jury may take into consideration the opportunities of the several witnesses of seeing and knowing the things about which they may testify, their interest, if any, or want of interest if any, in the result of the suit, the probability or improbability of the truth of the several statements in view of all the evidence, and the circumstances appearing upon the trial, and upon all these circumstances determine the weight and preponderance of the evidence.

Given.

Instruction 4.

The statutory law of the State of Indiana provides that "a married woman shall not enter into any contract of surety-ship, whether as indorser, guarantor, or in any other manner, and such contract as to her, shall be void," and if you find from the evidence that Mary Opperman was the owner of the certificate here in controversy and while she was so the owner, her husband, with her consent, placed the same in the possession of defendant to secure the payment to defendant of indebtedness due or to become due it from said husband, then I instruct you said arrangment constituted said Mary Opperman a surety and under the statute was void as to her, and after proper demand made by her on defendant, she was entitled to regain possession of said certificate and is entitled to your verdict, unless she became estopped as hereinafter explained.

Given.

Instruction 5.

The defendant contends that the plaintiff is estopped to claim ownership, and demand possession of the Certificate of stock

23 in question, because she signed the certificate of stock, in blank, and delivered said Certificate of stock to her husband, Henry F. Opperman, and permitted him to take said certificate to the defendant, and represent to the defendant that he, the said Henry A. F. Opperman, was the owner thereof, which representation the defendant contends, that it, through its cashier, Charles E. Arnt, then believed to be true, and accepted said Certificate as security, upon the statement of said Henry F. Opperman, not knowing the same to be false, and not knowing that Mary Opperman owned the Certificate of stock in question. The burden of proving the facts constituting this estoppel rests upon the defendant, and before the plaintiff's cause of action can be defeated, because of such estoppel, the defendant must prove by a preponderance of all the evidence in the case that the facts constituting such estoppel existed; that the defendant did not know, or have reason to know that Mary Opperman was the true owner of said Certificate of stock at the time it was accepted as security, by the defendant.

Given.

Instruction 6.

The burden is on defendant to establish the facts constituting an estoppel. The elements of such an estoppel are as follows, viz: First: That there was a misrepresentation or concealment of material facts; Second: That the Misrepresentation was made with knowledge of the facts; Third: That the party to whom it was made was ignorant of the truth of the matter; Fourth: That it was made with the
24 intention that the other party should act upon it, and Fifth: That the other party was induced to act upon it, to his injury.

Given.

Instruction 7.

The plaintiff cannot be estopped from maintaining this action and asserting the right to regain possession of said certificate, if, at the time said certificate was placed in the possession of defendant, its cashier, Mr. Arnt, knew said certificate belonged to plaintiff, or if the facts of the transaction shown by the evidence, through which the defendant bank got the certificate were such as would put a prudent man upon inquiry, and which inquiry if followed out, would lead to knowledge that plaintiff owned said certificate. "Where one has knowledge of facts sufficient to excite the attention of a person of ordinary prudence and put him upon further inquiry, he is required to make such inquiry in good faith and with diligence, and, in the absence of so doing, he will be charged with the knowledge of the particular point or fact which such inquiry would have revealed or imparted."

Given.

Instruction 8.

If you believe from the evidence that the plaintiff, in this case, at the time the suit was commenced, was lawfully entitled to the im-

mediate possession of the Certificate of Stock, described in the complaint, and that the defendant had the same in its possession,
25 and that a demand was made, and a refusal to deliver up the same, by the defendant, you will find for the plaintiff.

Given.

Instruction 9.

In determining the weight to be given to the testimony of a witness you may take into consideration the intelligence of the witness, the circumstances surrounding the witness at the time questioned, his interest, if any, in the result of the suit, his bias or prejudice, if any, his manner, the reasonableness or unreasonableness of his testimony, his observation, and knowledge in making his testimony, whether negatively or affirmatively, and all matters and facts and circumstances shown on the trial, upon the question of the weight to be given to his testimony and give to the testimony of each witness such weight as to you it may seem fairly entitled to.

Given.

Instruction 10.

If you find under the evidence and rules of law I have given you that the plaintiff is entitled to recover, it will be your duty to find the value of the Certificate of Stock in question, and to enter the value thereof in the form of verdict which will be furnished you.

Given.

Instruction 11.

If you return a verdict for plaintiff you should state therein the value of the property in controversy. That is to say, the now present value of the fifteen shares of the capital stock of the First National Bank of Michigan City represented by the Certificate in evi-
26 dence, together with the accrued dividends thereon as shown by the evidence.

Given.

Instruction 12.

If you find from the evidence that the plaintiff, Mary Opperman, signed the assignment on the certificate of stock in question and delivered it to her husband for the sole purpose of having him deposit it with the defendant Bank as security for a debt owing by her husband to the defendant Bank and you further find that her said husband did deposit the certificate with the bank as security for his debt, then the transaction constituted a contract of suretyship on her part, as surety for her husband's debt.

Given.

Instruction 13.

In order to create a contract of suretyship on the part of a married woman, it is not necessary that she enter into any express agreement,

either in writing or by parol, with the holder of the debt; but whenever the result of the transaction is such as to impose upon her property a liability to answer for the debt of another, she must be regarded as a surety and entitled to the protection of the statute.

When a married woman pledges her separate property to secure the debt of another, she occupies the position of a surety within the statute, whether she be a party to any written contract or not.

Given.

Instruction No. 14.

If you find from the evidence in this cause that the plain-
27 tiff is the owner and entitled to the possession of the property described in the complaint, and if you further find from the evidence that since the certificate of stock described in the complaint has been unlawfully in the possession of defendant, that dividends have accrued on said stock and which have been withheld from the plaintiff on account of defendant's possession of said stock, since a demand was made by plaintiff therefor—if any such demand you find—then I instruct you that the measure of plaintiff's damages for the detention of said property is interest at the rate of six per cent. per annum on said dividends so withheld, computed from the dates of accruing of said dividends respectively to the date of this trial; and if you should find that said dividends have not been so withheld, then plaintiff would only be entitled to nominal damages for such detention.

Given.

Instruction 15.

The court will submit to you certain interrogatories or questions. These interrogatories you are required to answer clearly and plainly and without evasion. The word "Ans." appears after each interrogatory, and is followed by a line, and you will write the answer to each interrogatory on the line following the word "Ans."

Given.

In answering the interrogatories, you should answer each one according to the preponderance of the evidence bearing upon the particular fact called for by the interrogatory. When you shall have done that, you will have discharged your full duty.
28 You should not make any effort to make answers to the interrogatories harmonize with your general verdict,—whatever that may be. You are simply to answer each interrogatory according to the fact as you may find it by a preponderance of the evidence.

Now at the close of the evidence, and before argument, the court indicates and rules that of the above and foregoing instructions tendered by the plaintiff and by it requested to be given to the jury, and numbered from One to Fifteen inclusive, it will give to the jury of said instructions those numbered 1 to 15.

Given.

Dated this 17 day of January, 1913.

ARTHUR L. HUBBARD, *Judge.*

And defendant excepts severally and separately to the giving by the court of each separate one of the above and foregoing instructions tendered by the plaintiff, and numbered respectively, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.

Given.

COLLINS & COLLINS,
DRUMMOND & DRUMMOND,
Attys. for Deft.

Dated this 17th day of January, 1913.

Instructions Tendered by Defendant.

No. 1. The Court instructs you that if you find from the evidence that the plaintiff in this cause assigned transferred and delivered the certificate of stock in question to her husband, knowing
29 at the time that she assigned and transferred said certificate of stock to her husband that he proposed to pledge and use the same for the purpose of securing his debt to the defendant herein and that she assigned, transferred and delivered said certificate to her said husband with the intention that he should so use said certificate for his own benefit and you further find that the defendant did not know at the time he accepted said certificate that it had been assigned to the plaintiff for the purpose of using or pledging the same to secure a debt to the defendant but in good faith believed that Henry Opperman, the husband of the plaintiff, was the owner of said certificate of stock at the time the defendant accepted the same, then I instruct you that the plaintiff is now estopped from asserting that she did not intend to sell, assign and transfer said certificate of stock to her husband to become his and to be used by him as his own and she cannot at this time recover said certificate of stock upon the ground that she was merely surety for him.

Given.

No. 2. The plaintiff alleges in her complaint that she is the owner and entitled to the possession of the certificate of bank stock in controversy. To this complaint the defendant files an answer in general denial. This answer imposes on the plaintiff the burden of proving that she is the owner and entitled to the possession of said bank stock, and this burden continues throughout the trial and if upon consideration of all the evidence you find that it is so evenly balanced upon the question whether the defendant took the
30 bank stock in the honest belief that Henry Opperman had the right to assign and pledge it as his own, that you are unable to say where the preponderance lies, then I instruct you that you should find for the defendant.

Given.

No. 3. The statute providing against the wife becoming surety for the payment of another's debt was not intended to defeat legitimate transactions in which she has the legal right and power to

engage. I, therefore, instruct you that the plaintiff had the legal right and power to make a gift to her husband of the bank stock in question, or to sell it to him or assign and deliver it to him, and if you believe from the evidence that it was her intention at the time she assigned and delivered the bank stock in question to her husband to vest in him the right to use it as his own, then I instruct you that he had the right to pledge it for his debt, and if you find he did pledge it as collateral security for the payment of a valid debt owing to the defendant, then your verdict should be for the defendant.

Given.

No. 4. It is the law in this State that a married woman may by her acts, declarations and conduct estop herself the same as any other person. And I instruct you that if you should find from the evidence that the plaintiff and her husband agreed as between them that he was to take the certificate of bank stock in question to be used as security, and that she was to remain the owner
31 thereof, still if you find from the evidence that she assigned said bank stock in writing and that said writing on its face purported to give to her husband full power to sell and assign said certificate, and you find that she delivered said assignment to her husband and knowingly permitted him to take the same and the certificate with him to be used in procuring credit or extension of time for the payment of his debt to the defendant, and you further find that by reason of the acts and conduct aforesaid of the plaintiff the defendant was in good faith led to accept said certificate of bank stock, under the belief that the husband, Henry Opperman, was the owner thereof and extended the time of payment of the debt of said husband, then I instruct you that the plaintiff is estopped to claim that she is the owner of said bank stock and your verdict should be for the defendant.

Refused.

No. 5. The Court instructs you that the provision in the assignment of the certificate to wit: "Transferable only on the books of the bank in person or by attorney on the surrender of this certificate," has no vitality or force whatever.

Given.

No. 6. I instruct you that it was not necessary to the validity of the transfer of the stock certificate in question that the blanks should have been filled in before or at the time of delivery. The delivery of bank stock with the name of the owner signed to the assignment, if you find the facts so to be, is prima facie au-
32 thority to the person to whom it is delivered to fill in the blank assignment with his name.

Given.

No. 7. I instruct you that provision by laws of a corporation, that certificates of stock shall be transferable only on the books of the

corporation, are made for the protection of the corporation. Such provision does not invalidate a transfer of the stock by the holder thereof, to another, where the transfer is not made on the books of the bank, but such transfer is valid between the owner thereof, and the person to whom such owner transferred it, whether the owner sells the stock or pledges it as security for a debt.

Given.

No. 8. The Court instructs you that if you find from the evidence that at the time the certificate of stock in question was delivered to the defendant bank said Opperman was indebted to said bank and notes prior thereto had been given to said bank for said indebtedness by him and at the time of such delivery of said certificate of stock one or more of said notes were due and the balance were about to become due and you further find that it was agreed between said Henry Opperman and the bank that in consideration of the assignment of the certificate of stock in question the time of payment of said notes or one or more of them was to be extended and such extension was given on said agreement, than I instruct you that such extension was a good and sufficient consideration between defendant and Henry Opperman for the assignment and delivery of the certificate of Stock to the bank
33 by said Henry Opperman.

Given.

No. 9. The Court instructs you that a married woman has, under the law in Indiana, a right to sell, assign and transfer her personal property as she may see fit and I, therefore, instruct you that at the time the plaintiff signed the bank stock certificate here in controversy that she possessed the power to sell and assign the same to her husband or any other person. Therefore, I instruct you that if you find from the evidence that she did sign the assignment on the back of the certificate in question and voluntarily and of her own accord delivered the same to her husband with full power to sell the same or pledge the same for his individual debt, and that the defendant herein accepted said certificate of purchase believing in good faith at the time it so accepted it that Henry Opperman was the owner thereof, then I instruct you that its right to the possession of the same cannot be taken away by proof of the fact, if such fact was proven, that the said Henry Opperman delivered said certificate of stock to the bank *the said Henry Opperman delivered said certificate of stock to the bank* as collateral security for the payment of his debt.

Refused.

No. 10. Where a party by clothing another with the legal marks of ownership enables him to mislead others to their injury the party who made such deception possible and not those who are mislead must be the sufferer for where one of two innocent persons must suffer by the act of a third person that one must suffer who put it in the power of the third person to do the act.
34 Given.

No. 11. As between the owner of shares of stock in a bank and the purchaser the property in the shares passes to the purchaser by the delivery of the certificate with the power of attorney signed without the formality of a transfer on the books of the bank and the delivery of such a certificate with the assignment executed in blank to a creditor as collateral security for a debt gives the creditor the right to hold such certificate as security for such debt and on default of payment to sell the certificate for the purpose of payment. The title as between the owner and purchaser passes by the delivery of the certificate with the accompanying power of attorney.

Given.

No. 12. Although you may find from the evidence that there was an agreement between plaintiff and her husband, that the stock certificate sued for in this action should remain the property of the plaintiff notwithstanding her assignment and that it should be hypothecated for her husband's debt; still you are instructed that the defendant is not bound by any private agreements made between the plaintiff and her husband unless the defendant had notice or knowledge of such agreements. It is not enough for the plaintiff to show that as between her and her husband she is only surety; but she must also show that the defendant either contracted with her surety or that the circumstances were such as to charge the defendant with knowledge of such fact.

35 Given.

No. 13. If you shall find that at the time the stock certificate was placed in the hands of the Cashier of the bank as collateral security, the plaintiff was no longer the owner of such certificate than you will find for the defendant.

Given.

No. 14. In order to recover in this action the plaintiff must establish by a preponderance of the evidence, that while she was a married woman she entered into a contract of suretyship with the defendant and that the defendant had knowledge of the fact that her connection with the contract was in the capacity of a surety.

Given.

No. 15. If you shall find from the evidence that the plaintiff signed the blank form of assignment on the back of said certificate and delivered it to her husband without writing upon the certificate any restrictions to her transfer and that the plaintiff never gave to the defendant any notice verbal or otherwise, that she claimed to be the owner of said certificate and that the defendant accepted such certificate as collateral security for the debts of the husband relying on the assignment signed by the plaintiff and upon the fact that said certificate was in the possession of her husband and that defendant had no notice or knowledge as to the ownership of the certificate except the assignment thereon and the possession of the husband, then the plaintiff is estopped to claim to own said

certificate as against the defendant and your verdict will be for the defendant.

Refused.

No. 16. The statute on which the claim of the plaintiff is founded reads as follows, "A married woman shall not enter into
36 any contract of suretyship, whether as endorser guarantor or in any other manner, and such contract, as to her, shall be void" and in order to find for the plaintiff the jury must be satisfied by preponderance of the evidence that some contract of suretyship existed between plaintiff and the defendant and if you should conclude from the evidence that there was a contract of suretyship but that it was entered into between plaintiff and the husband of the plaintiff and that the defendant was not a party to such conract, then you will find for the defendant.

Refused.

No. 17. You are instructed that the extension of the time for the payment of a debt or an agreement to extend the time for the payment of a debt about to become due is, in law, a good consideration, and if the defendant in this action in consideration of the deposit of the certificate of stock by the husband of the plaintiff extended the time for the payment of the husband's debts or agreed to extend the time for the payment of certain debts owing by plaintiff's husband to the bank which were about to become due, then the defendant became the holder of said certificate for a valuable consideration and vested with all the rights in said certificate which were given to it by the collateral contract.

Refused.

No. 18. I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to
37 her husband or any other person. And if you find from the evidence that she signed and executed a written assignment of said certificate of stock which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband took the same to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt.

Refused.

No. 19. If you should find from the evidence that the plaintiff was the owner of the certificate of stock in question, notwithstanding her assignment thereof in writing, and it was agreed by and between

her and her husband that he might pledge the same to the defendant as security for the debt of her husband, and you further find that the defendant had no actual notice of said agreement between the plaintiff and her husband and that the defendant before accepting said certificate exercised that degree of care and diligence to ascertain and know whether plaintiff was the owner of said stock as a reasonably careful and diligent person would exercise under like circumstances, then I instruct you that knowledge that
38 the plaintiff was the owner of said stock at said time and that it was being pledged as her property cannot be imputed to defendant.

Given.

No. 20. If you shall find that the certificate of stock sued for in this action was placed with the Cashier of the defendant bank, by the husband of the plaintiff as security for money owing to the bank by the said husband and that at the time, the said Cashier of the said defendant Bank believed that the husband of the plaintiff was the owner of said certificate and that said Cashier had no notice or knowledge of any claim or interest in said certificate belonging to the plaintiff, then you will find for the defendant.

Given.

No. 21. I instruct you as a matter of law that where a married woman places title to property, as in this instance a certificate of stock, in her husband, and the husband places such property in the hands of the defendant bank as collateral for money that he received from the said bank or for renewals of notes for money that he received, and that the bank had no notice of the wife's interest in the certificate of stock, that in that event your verdict should be for the defendant.

Refused.

No. 22. A married woman cannot claim against the holder of collateral the rights of a surety when her husband had the title to the property that he placed in the hands of the defendant as collateral, and where there is nothing to put the holder of the collateral
39 on notice of the wife's equitable interest in the property.

Refused.

No. 23. I instruct you as a matter of law that where a bona fide purchaser of a non-negotiable security, from one upon whom the owner thereof has conferred the apparent ownership, obtains a good title against the owner as the owner is estopped from asserting her true title against such bona fide purchaser. And I instruct you that the defendant in this case is treated and should be treated by you as a purchaser of the stock involved in this case.

Refused.

No. 24. I instruct you that as a matter of law there is a well established principle that where the true owner of property holds out an-

other or permits or allows to appear as the owner of or as having full power of disposition over, property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner, which precludes the real owner from disputing, as against a third party, the existence of the title or power, which he caused or allowed to appear to be vested in the party making the sale or placing the property in the hands of the third party as collateral to a debt; and I further instruct you as a matter of law that this rule applies to a married woman.

Refused.

40 Now at the close of the evidence, and before argument the court indicates and rules that if the above and foregoing instructions tendered by the defendant and by it requested to be given to the jury, and numbered from one to twenty-four, both inclusive, it will give to the jury of said instructions those numbered 1, 2, 3, 4, 6, 7, 8, 9, 11, 12, 13, 14, 15, 19, 20, and refuse to give of the said instructions those numbered 5, 10, 16, 17, 18, 21, 22, 23, 24.

Dated this 17 day of January, 1913.

ARTHUR L. HUBBARD, *Judge.*

And defendant excepts severally and separately to the refusal of the court to give each the said several tendered instructions tendered by defendant and numbered 5, 10, 16, 17, 18, 21, 22, 23, 24.

COLLINS & COLLINS,
DRUMMOND & DRUMMOND,
Attys. for Defendant.

Dated this January 17, 1913.

41 And now the jury retires in charge of a sworn bailiff, to deliberate upon their verdict and the answers to interrogatories number One (1) to Eighty-five (85) both inclusive, which interrogatories are submitted to the said jury for their answers.

42 And, be it remembered, That afterwards, to wit, on the 18th day of January, 1913, the same being the 24th Judicial day of the December Term, 1912 of said Court, begun and held as aforesaid, the following further proceedings were had in the above entitled cause, to wit:

#799.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, IND.

Come now the parties herein and also comes the jury and the Jury returns their verdict into open Court in the above entitled cause, which verdict is in these words, to wit:

Verdict.

STATE OF INDIANA,
St. Joseph County, ss:

In the St. Joseph Superior Court, November Term, 1912.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, IND.

We, the jury, find for the plaintiff, Mary Opperman, and that she is the owner and is entitled to the possession of the property described in the complaint, and that defendant unlawfully detains the same; we further find that said property is of the value of Thirty one hundred fifty ($3150.00) dollars, and we assess plaintiff's damages for the detention thereof at $—.

J. B. WITWER, *Foreman.*

Together with the answers to the interrogatories, which interrogatories and answers are in these words, to wit:

43 *Interrogatories and Answers.*

Interrogatory 1. Is the plaintiff, Mary Opperman, the wife of Henry A. F. Opperman.

Ans. Yes.

Int. 2. Were the plaintiff and Henry A. F. Opperman married in the year 1877.

Ans. Yes.

Int. 3. If you answer Yes to the last interrogatory, then answer this one: Have the plaintiff, Mary Opperman, and Henry A. F. Opperman lived together as husband and wife ever since they were married.

Ans. Yes.

Int. 4. Is Charles E. Arnt President of the defendant, Citizens Bank of Michigan City.

Ans. Yes.

Int. 5. Has Charles E. Arnt been President of the defendant Citizens Bank of Michigan City, for about four years.

Ans. Yes.

Int. 6. Was Charles E. Arnt Cashier of the defendant, Citizens Bank of Michigan City, during the years 1904 and 1905.

Ans. Yes.

Int. 7. Was Charles E. Arnt acquainted with the plaintiff, Mary Opperman, and Henry A. F. Opperman, during the years 1904 and 1905.

Ans. Yes.

Int. 8. Has Charles E. Arnt known Mary Opperman and
44 Henry A. F. Opperman for approximately twenty years.

Ans. Yes.

Int. 9. Has Charles E. Arnt known for approximately twenty years that the plaintiff, Mary Opperman, and Henry A. F. Opperman were husband and wife.

Ans. Yes.

Int. 10. Did Charles E. Arnt continuously during the year 1904 know that the plaintiff, Mary Opperman, and Henry A. F. Opperman were husband and wife.

Ans. Yes.

Int. 11. During all of the year 1904, did Charles E. Arnt know that Henry A. F. Opperman and Mary Opperman, the plaintiff, were living together as husband and wife.

Ans. Yes, to the best of his recollection.

Int. 12. Was Henry A. F. Opperman in the mercantile business in Michigan City, Indiana, during the year 1904, and prior thereto.

Ans. Yes.

Int. 13. Did Charles E. Arnt know that Henry A. F. Opperman was in the mercantile business in Michigan City, Indiana, during the year 1904.

Ans. Yes.

Int. 14. Did Henry A. F. Opperman borrow at the defendant Citizens Bank of Michigan City Five Hundred dollars on February 17, 1903.

Ans. Yes.

45 Int. 15. If your answer to the last question is Yes, then answer this question: Did Henry A. F. Opperman check said Five Hundred Dollars out of said bank in payment of debts he owed in his mercantile business.

Ans. Yes.

Int. 16. Did Henry A. F. Opperman borrow from defendant Citizens Bank of Michigan City One thousand dollars on April 30, 1904.

Ans. Yes.

Int. 17. If your answer to the last question is Yes, then answer this one; Did Henry A. F. Opperman check said One thousand dollars out of said bank in payment of debts he owed in his mercantile business.

Ans. Yes.

Int. 18. Did Henry A. F. Opperman borrow from defendant Citizens Bank of Michigan City one thousand dollars on March 7, 1904.

Ans. Yes.

Int. 19. If your answer to the last question is yes, then answer this one: Did Henry A. F. Opperman check said One thousand dollars out of said bank in payment of debts he owed in his mercantile business.

Ans. Yes.

Int. 20. Did Henry A. F. Opperman borrow from defendant Citizens Bank of Michigan City One thousand dollars on July 1st, 1904.

Ans. Yes.

46 Int. 21. If your answer to the last question is yes, then answer this one: Did Henry A. F. Opperman check said

One thousand dollars out of said bank in payment of debts he owed in his mercantile business.

Ans. Yes.

Int. 22. Did Henry A. F. Opperman borrow from defendant Citizens Bank of Michigan City One hundred twenty-nine dollars, fifteen cents, on July 21st, 1904.

Ans. Yes.

Int. 23. If your answer to the last question is yes, then answer this one: Did Henry A. F. Opperman check said One hundred twenty-nine dollars, fifteen cents, out of said bank in payment of debts he owed in his mercantile business.

Ans. Yes.

Int. 24. If your answer to Interrogatories 14, 16, 18, 20 and 22 is Yes, then answer this one: In August and September, 1904, did Henry A. F. Opperman owe the Citizens Bank of Michigan City any money besides the money borrowed therefrom, as inquired about in said interrogatories.

Ans. No.

Int. 25. Did Mary Opperman own any interest in the mercantile business of Henry A. F. Opperman.

Ans. No.

Int. 26. If your answer to the above question is Yes, then answer this one: What interest did Mary Opperman own in the mercantile business of Henry A. F. Opperman.

47 Ans. —.

Int. 27. Did Henry A. F. Opperman in August and September, 1904, owe the defendant Citizens Bank of Michigan City approximately thirty-six hundred dollars.

Ans. Yes.

Int. 28. Did the defendant, Citizens Bank of Michigan City, in August and September, 1904, hold promissory notes of Henry A. F. Opperman in the aggregate sum of approximately Thirty six hundred dollars.

Ans. Yes.

Int. 29. If your answer to Interrogatories 14, 16, 18, 20 and 22 is Yes, then answer this one: Was any of the money borrowed by Henry A. F. Opperman from the defendant, Citizens Bank of Michigan City, paid or delivered to Mary E. Opperman.

Ans. No, not to Mary Opperman.

Int. 30. Was any of the money mentioned in the last above interrogatory used to pay any debts or liabilities of Mary Opperman.

Ans. No.

Int. 31. Was Mary Opperman a daughter of John Krueger, deceased.

Ans. Yes.

Int. 32. Did Jo[illegible]eger die in the year 1889.

Ans. Yes.

Int. 33. If your answer to the last above interrogatory is Yes, then answer this one: At the time of the death of John Krueger,

48 was he the owner of twenty shares of the capital stock of the First National Bank of Michigan City, Indiana.

Ans. Yes.

Int. 34. If your answer to the last above interrogatory is Yes, then answer this one: Was said twenty shares of stock left in the possession and control of the widow of John Kreuger during her life time.

Ans. Yes.

Int. 35. Was the widow of John Krueger named Mary Krueger.

Ans. Yes.

Int. 36. Did Mary Krueger die about the year 1903.

Ans. Yes.

Int. 37. If your answer to the last above interrogatory is Yes, then answer this one: After the death of Mary Krueger, was fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana, transferred to the plaintiff, Mary Opperman.

Ans. Yes.

Int. 38. Is Mary Opperman a daughter of Mary Kreuger.

Ans. Yes.

Int. 39. After the death of Mary Kreuger, did Mary Opperman become the owner of fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana.

Ans. Yes.

Int. 40. After the death of Mary Kreuger, was a certificate
49 of stock of the First National Bank of Michigan City, numbered Three hundred and eighty five (385) issued by said Bank to the plaintiff, Mary Opperman.

Ans. Yes.

Int. 41. If your answer to the last preceding Interrogatory is Yes, then answer this one: Did said certificate of stock No. 385 represent fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana.

Ans. Yes.

Int. 42. Are the fifteen shares of stock represented by the certificate of stock mentioned in the last above interrogatory, now worth $2,250.00.

Ans. Yes.

Int. 43. Since the beginning of this cause of action, has $900.00 in dividends accumulated on said fifteen shares of capital stock mentioned in the last above interrogatory.

Ans. Yes.

Int. 44. If your answer to Interrogatory No. 40 is Yes, then answer this one:

Did the plaintiff, Mary Opperman, take said certificate of stock and place the same in a tin box.

Ans. Yes.

Int. 45. Was said tin box mentioned in the last above interrogatory a box owned by said Mary Opperman, the plaintiff.

Ans. Yes.

Int. 46. Was said tin box mentioned in Interrogatory No.
50 44, a tin box in which Mary Opperman kept her private papers.

Ans. Yes.

Int. 47. Did Mary Opperman keep the said tin box, mentioned in Interrogatory No. 44 in her own room.

Ans. Yes.

Int. 48. Did Charles E. Arnt in August or September, 1904, ask Henry A. F. Opperman to deposit with the defendant, Citizens Bank of Michigan City, some security for the debt mentioned in Interrogatory No. 27.

Ans. Yes.

Int. 49. If your answer to the last above interrogatory is Yes, then answer this one: Did said Henry A. F. Opperman tell said Charles E. Arnt in substance that he could put up as security the certificate of stock referred to in Interrogatory No. 40.

Ans. Yes.

Int. 50. If your answer to the last above interrogatory is yes, then answer this one. Did Charles E. Arnt then tell Henry A. F. Opperman that said certificate of stock would be all right for security, or words to that effect.

Ans. Yes.

Int. 51. Did Charles E. Arnt and Henry A. F. Opperman have any conversation concerning security for the debt of said Opperman to the Citizens bank, other than in the regular course of business at the banking establishment of *of* the defendant.

51

Ans. No.

Int. 52. Did Henry A. F. Opperman at his residence after being asked by Charles E. Arnt for security for his debt to the defendant bank have a conversation with the plaintiff concerning the use of the certificate of stock mentioned in Interrogatory 40 as security for his obligation to the defendant bank.

Ans. Yes.

Int. 53. If your answer to Interrogatory No. 52 is Yes, then answer this one: Did said Henry A. F. Opperman in said conversation tell his wife in substance that he wanted the certificate of stock mentioned in Interrogatory No. 40 for security on the debt mentioned in Interrogatory No. 27, at the defendant Citizens Bank of Michigan City.

Ans. Yes.

Int. 54. If your answer to the above interrogatory No. 53 is yes, then answer this one.

Did the plaintiff, Mary Opperman, then go to her tin box, take out the certificate of stock mentioned in Interrogatory No. 40, sign her name to the blank assignment on the back thereof, and hand the same to said Henry A. F. Opperman.

Ans. Yes.

Int. No. 55. If your answer to the last foregoing interrogatory is Yes, then answer this one: Did Mary Opperman when she handed the said certificate of stock to her husband hand it to him to be deposited with the defendant Citizens Bank as security for the debt mentioned in Interrogatory No. 27.

52

Ans. Yes.

Int. 56. Did Henry A. F. Opperman ever pay Mary Opperman

anything for the certificate of stock mentioned in Interrogatory No. 40.

Ans. No.

Int. 57. Did Mary Opperman ever receive anything from anybody for the certificate of stock mentioned in Interrogatory No. 40.

Ans. No.

Int. 58. Has the stock represented by the certificate mentioned in Interrogatory No. 40 ever been transferred on the books of the First National Bank of Michigan City, Indiana, from the name of Mary Opperman to any other person.

Ans. No.

Int. 59. Did Henry A. F. Opperman tender the certificate of stock mentioned in Interrogatory No. 40 to Charles E. Arnt on behalf of the defendant as security for the debt mentioned in Interrogatory No. 27.

Ans. Yes.

Int. 60. If your answer to the last foregoing interrogatory is Yes, then answer this one: Did Charles Arnt examine said certificate of stock and tell said Henry A. F. Opperman in substance that
53 Mary Opperman had not signed the certificate in the proper place.

Ans. Yes.

Int. 61. If your answer to the last foregoing interrogatory is Yes, then answer this one: Did said Charles E. Arnt with either a pencil or a pen make an X at the place on the blank assignment on the back of said certificate of stock mentioned in Interrogatory No. 40 at the place where he desired Mary Opperman to sign her name.

Ans. Yes.

Int. 62. If your answer to the last foregoing interrogatory is Yes, then answer this one: Was the certificate of stock then returned to Mary Opperman to be resigned at the place indicated by Charles E. Arnt.

Ans. Yes.

Int. 63. If your answer to the last foregoing interrogatory is Yes, then answer this one: Did Mary Opperman sign the said certificate of stock at the place indicated by said Charles E. Arnt.

Ans. Yes.

Int. 64. After signing the certificate of stock at the place indicated by said Charles E. Arnt, did Mary Opperman hand the said certificate back to her husband, Henry A. F. Opperman, for the purpose of taking it to the bank to be deposited as security.

Ans. Yes.

Int. 65. Did Henry A. F. Opperman present the certificate of stock to Charles E. Arnt as security for his debt after the
54 plaintiff had signed the same at the point indicated by Charles E. Arnt.

Ans. Yes.

Int. 66. If your answer to the last above interrogatory is Yes, then answer this one; Did the said Charles E. Arnt examine the certificate again and say in substance that it was all right, and ac-

cept it as security for the debt mentioned in Interrogatory Numbered 27.

Ans. Yes.

Int. 67. Just a few days prior to the commencement of this action, did the plaintiff through her attorney make a demand on the defendant, Citizens Bank of Michigan City, for the return of the certificate of stock mentioned in Interrogatory No. 40.

Ans. Yes.

Int. 68. If your answer to the last above interrogatory is Yes, then answer this one: Did the defendant Citizens Bank of Michigan City refuse to return the said certificate of stock.

Ans. Yes.

Int. 69. If your answer to the last above interrogatory is Yes, then answer this one: Has the certificate ever been returned to her.

Ans. No.

Int. 70. Did Mary Opperman draw two dividends of Sixty Dollars each of the stock since the stock was pledged with the defendant Citizens Bank of Michigan City.

55 Ans. Yes.

Int. 71. Has the said Mary Opperman always claimed to own the certificate of stock in question?

Ans. Yes.

Int. 72. Did Charles E. Arnt, at the time that the certificate of stock mentioned in Interrogatory numbered 40, was deposited with defendant bank, know that the shares of stock represented thereby stood in the name of Mary Opperman on the books of the First National Bank of Michigan City.

Ans. He supposed it was.

Int. 73. Did Charles E. Arnt at any time before the commencement of this action, ask the plaintiff, Mary Opperman, who owned the certificate of stock numbered 385, mentioned in Interrogatory No. 40.

Ans. No.

Int. 74. Did Charles E. Arnt at any time before the commencement of this action ask any one who owned the certificate of stock mentioned in Interrogatory No. 40.

Ans. No.

Int. 75. If your answer to the last above interrogatory is Yes, then answer this one; Whom did he ask?

Ans. ——.

Int. 76. If you answer interrogatory No. 43 Yes, then would interest on said $900.00 of dividends from the times they respectively accrued amount to $189.00.

Ans. Yes at 6%.

56 No. 77. Was the plaintiff, Mary Opperman, on the 19th day of September, 1904, the owner of the certificate of stock in question?

Ans. Yes.

No. 78. Did she on that day execute her assignment thereof and deliver said certificate to her husband, together with said assignment, to be used by him as his own.

Ans. No.

No. 79. Did the husband of plaintiff take said certificate and assignment thereof by plaintiff, to the defendant bank.

Ans. Yes.

No. 80. Did the defendant bank accept said certificate and assignment thereof as security for the payment of about $3,630.

Ans. Yes.

No. 81. Did the defendant at the time it accepted said certificate of stock believe that said certificate of stock was owned by the plaintiff's husband, Henry Opperman.

Ans. No.

No. 82. Did the plaintiff make any claim of ownership of said certificate of stock until nearly a year after she had executed and delivered her written assignment thereof to her husband.

Ans. Yes.

No. 83. When the plaintiff executed her assignment of the certificate of stock involved in this suit did she thereafter
57 deliver the said certificate to her husband.

Ans. Yes.

No. 84. Did the defendant bank and its officers in accepting the certificate of stock involved in this suit as collateral or as security for the payment of the debt or debts of the husband of the plaintiff have good reason to believe that Henry Opperman was the owner of said certificate.

Ans. No.

No. 85. When the husband of the plaintiff delivered the certificate of stock in question in this suit did the defendant bank extend the time for the payment of any indebtedness due it.

Ans. Yes.

J. B. WITWER, *Foreman.*

And, be it remembered, That afterwards, towit, on the 28th day of January, 1913, the same being the 32nd Judicial day of the December Term, 1912 of said Court begun and held as aforesaid, the following further proceedings were had in the above entitled cause, to wit:

Judgment on Verdict.

#799.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, IND.

Come now the parties by counsel, and now the court on motion of the plaintiff heretofore made, orders judgment rendered on the verdict heretofore returned in this cause.

It is therefore considered and adjudged by the Court that
58 the plaintiff recover of the defendant the property described in the complaint, to wit: One Certificate No. 385 for fifteen

shares of the capital stock of the First National Bank of Michigan City, Indiana; that said property is of the value of Thirty one hundred and fifty dollars ($3,150.00) and that the defendant unlawfully detains the same from the plaintiff.

It is therefore, considered and adjudged by the Court that upon the failure of the defendant to deliver up to the plaintiff said property, the plaintiff recover of the defendant the sum of Thirty one hundred and fifty Dollars ($3,150.00).

It is further considered and adjudged that the plaintiff recover of the defendant his costs, and charges in this cause laid out and expended, amounting to $—.

ARTHUR L. HUBBARD, *Judge.*

59 And defendant's Bill of Exceptions No. One on the instructions is now signed and filed and is in these words, as follows, to-wit:

Defendant's Bill of Exceptions No. 1.

STATE OF INDIANA,
St. Joseph County, ss:

In the St. Joseph Superior Court.

No. 799.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY.

Bill of Exceptions on Instructions.

Be it remembered that on the 16th day of January, 1913, the same being the 22 juridical day of the December Term, 1912 of said Court, the following proceedings were had in said cause, to wit:

Before the argument in said cause the defendant filed with the court its request in writing that the court should give its instructions to the jury in writing and with said request and before argument in said cause, tendered its instructions to the court, in writing and requested the court in writing to give each of said instructions to the jury as a part of the instructions in said cause which instructions so tendered and requested by the plaintiff are in the words, to wit:

60 No. 1. The Court instructs you that if you find from the evidence that the plaintiff in this cause assigned, transferred and delivered the certificate of stock in question to her husband, knowing at the time that she assigned and transferred said certificate of stock to her husband that he proposed to pledge and use the same for the purpose of securing his debt to the defendant herein and that she assigned, transferred and delivered said cer-

tificate to her said husband with the intention that he should so use said certificate for his own benefit and you further find that the defendant did not know at the time he accepted said certificate that it had been assigned to the plaintiff for the purpose of using or pledging the same to secure a debt to the defendant but in good faith believed that Henry Opperman, the husband of the plaintiff, was the owner of said certificate of stock at the time the defendant accepted the same, then I instruct you that the plaintiff is now estopped from asserting that she did not intend to sell, assign and transfer said certificate of stock to her husband to become his and to be used by him as his own and she cannot at this time recover said certificate of stock upon the ground that she was merely surety for him.

No. 2. The plaintiff alleges in her complaint that she is the owner and entitled to the possession of the certificate of bank stock in controversy. To this complaint the defendant files an answer in general denial. This answer imposes on the plaintiff the
61 burden of proving that she is the owner and entitled to the possession of said bank stock, and this burden continues throughout the trial and if upon consideration of all the evidence you find that it is so evenly balanced upon the question whether the defendant took the bank stock in the honest belief that Henry Opperman had the right to assign and pledge it as his own, that you are unable to say where the preponderance lies, than I instruct you that you should find for the defendant.

No. 3. The statute providing against the wife becoming surety for the payment of another's debt was not intended to defeat legitimate transactions in which she has the legal right and power to engage. I, therefore, instruct you that the plaintiff had the legal right and power to make a gift to her husband of the bank stock in question, or to sell it to him or assign and deliver it to him, and if you believe from the evidence that it was her intention at the time she assigned and delivered the bank stock in question to her husband to vest in him the right to use it as his own, then I instruct you that he had the right to pledge it for his debt, and if you find he did pledge it as collateral security for the payment of a valid debt owing to the defendant, then your verdict should be for the defendant.

No. 4. It is the law in this State that a married woman may by her acts, declarations and conduct estop herself the same as any other person. And I instruct you that if you should find
62 from the evidence that the plaintiff and her husband agreed as between them that he was to take the certificate of bank stock in question, to be used as security, and that she was to remain the owner thereof, still if you find from the evidence that she assigned said bank stock in writing and that said writing on its face purported to give her husband full power to sell and assign said certificate, and you find that she delivered said assignment to her husband and knowingly permitted him to take the same and the certificate with him to be used in procuring credit or extension of time for the payment of his debt to the defendant, and you further

find that by reason of the acts and conduct aforesaid of the plaintiff the defendant was in good faith led to accept said certificate of bank stock, under the belief that the husband, Henry Opperman, was the owner thereof and extended the time of payment of the debt of said husband, then I instruct you that the plaintiff is estopped to claim that she is the owner of said bank stock and your verdict should be for the defendant.

No. 5. The Court instructs you that the provision in the assignment of the certificate to wit: "Transferable only on the books of the bank in person or by attorney on the surrender of this certificate," has no vitality or force whatever.

No. 6. I instruct you that it was not necessary to the validity of the transfer of the stock certificate in question that the
63 blanks should have been filled in before or at the time of delivery. The delivery of bank stock with the name of the owner signed to the assignment, if you find the facts so to be, is prima facie authority to the person to whom it is delivered to fill in the blank assignment with his name.

No. 7. I instruct you that provision by by-laws of a corporation, that certificates of stock shall be transferable only on the books of the corporation are made for the protection of the corporation. Such provision does not invalidate a transfer of the stock by the holder thereof, to another, where the transfer is not made on the books of the bank, but such transfer is valid between the owner thereof and the person to whom such owner transferred it, whether the owner sells the stock or pledges it as security for a debt.

No. 8. The Court instructs you that if you find from the evidence that at the time the certificate of stock in question was delivered to the defendant bank said Opperman was indebted to said bank and notes prior thereto had been given to said bank for said indebtedness by him and at the time of such delivery of said certificate of stock one or more of said notes were due and the balance were about to become due and you further find that it was agreed between said Henry Opperman and the bank that in consideration of the assignment of the certificate of stock in question the time of payment of said notes or one or more of them was
64 to be extended and such extension was given on said agreement, then I instruct you that such extension was a good and sufficient consideration as between defendant and Henry Opperman for the assignment and delivery of the certificate of stock to the bank by said Henry Opperman.

No. 9. The Court instructs you that a married woman has, under the law in Indiana, a right to sell, assign and transfer her personal property as she may see fit and I, therefore, instruct you that at the time the plaintiff signed the bank stock certificate here in controversy that she possessed the power to sell and assign the same to her husband or any other person. Therefore, I instruct you that if you find from the evidence that she did sign the assignment on the back of the certificate in question and voluntarily and of her own accord delivered the same to her husband with full power to sell the same or pledge the same for his individual debt, and that

the defendant herein accepted said certificate of purchase believing in good faith at the time it so accepted it that Henry Opperman was the owner thereof, then I instruct you that its right to the possession of the same cannot be taken away by proof of the fact, if such fact was proven, that the said Henry Opperman delivered said certificate of stock to the bank as collateral security for the payment of his debt.

No. 10. Where a party by clothing another with the legal marks of ownership enables him to mislead others to their injury the party who made such deception possible and not those who
65 are mislead must be the sufferer for where one of two innocent persons must suffer by the act of a third person that one must suffer who put *in* in the power of the third person to do the act.

No. 11. As between the owner of shares of stock in a bank and the purchaser the property in the shares passes to the purchaser by the delivery of the certificate with the power of attorney signed, without the formality of a transfer on the books of the bank and the delivery of such certificate with the assignment executed in blank to a creditor as collateral security for a debt gives the creditor the right to hold such certificate as security for such debt and on default of payment to sell the certificate for the purpose of payment. The title as between the owner and purchaser passes by the delivery of the certificate with the accompanying power of attorney.

No. 12. Although you may find from the evidence that there was an agreement between plaintiff and her husband, that the stock certificate sued for in this action should remain the property of the plaintiff notwithstanding her assignment and that it should be hypothecated for her husband's debt; still you are instructed that the defendant is not bound by any private agreements made between the plaintiff and her husband unless the defendant had notice or knowledge of such agreements. It is not enough for the plaintiff to show that as between her and her husband she is only surety; but she must also show that the defendant either contracted with her
66 as surety or that the circumstances were such as to charge the defendant with knowledge of such fact.

No. 13. If you shall find that at the time the stock certificate was placed in the hands of the Cashier of the bank as collateral security, the plaintiff was no longer the owner of such certificate then you will find for the defendant.

No. 14. In order to recover in this action the plaintiff must establish by a preponderance of the evidence that while she was a married woman she entered into a contract of suretyship with the defendant and that the defendant had knowledge of the fact that her connection with the contract was in the capacity of a surety.

No. 15. If you shall find from the evidence that the plaintiff signed the blank form of assignment on the back of said certificate and delivered it to her husband without writing upon the certificate any restrictions to her transfer and that the plaintiff never gave to the defendant any notice, verbal or otherwise, that she claimed to be the owner of said certificate and that the defendant accepted such certifi-

cate as collateral security for the debts of the husband relying on the assignment signed by the plaintiff and upon the fact that said certificate was in the possession of her husband and that defendant had no notice or knowledge as to the ownership of the certificate except the assignment thereon and the possession of the husband, then the plaintiff is estopped to claim to own said certificate as against the defendant and your verdict will be for the defendant.

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No. 16. The Statute on which the claim of the plaintiff is founded reads as follows, "A married woman shall not enter into any contract of suretyship, whether as endorser, guarantor or in any other manner, and such contract, as to her, shall be void," and in order to find for the plaintiff the jury must be satisfied by preponderance of the evidence that some contract of suretyship existed between plaintiff and the defendant and if you should conclude from the evidence that there was a contract of suretyship but that it was entered into between plaintiff and the husband of the plaintiff and that the defendant was not a party to such contract, then you will find for the defendant.

No. 17. You are instructed that the extension of the time for the payment of a debt or an agreement to extend the time for the payment of a debt about to become due is, in law, a good consideration, and if the defendant in this action in consideration of the deposit of the certificate of stock by the husband of the plaintiff extended the time for the payment of the husband's debts or agreed to extend the time for the payment of certain debts owing by plaintiff's husband to the bank which were about to become due, then the defendant became the holder of said certificate for a valuable consideration and vested with all the rights in said certificate which were given to it by the collateral contract.

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No. 18. I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to her husband or and other person. And if you find from the evidence that she signed and executed a written assignment of said certificate of stock which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband took the same to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt.

No. 19. If you should find from the evidence that the plaintiff was the owner of the certificate of stock in question, notwithstanding her assignment thereof in writing, and that it was agreed by and between her and her husband that he might pledge the same to the defendant as security for the debt of her husband, and you further find that the defendant had no actual notice of said agreement between

69 the plaintiff and her husband and that the defendant before accepting said certificate exercised that degree of care and diligence to ascertain and know whether plaintiff was the owner of said stock as a reasonably careful and diligent person would exercise under like circumstances, then I instruct you that knowledge that the plaintiff was the owner of said stock at said time and that it was being pledged as her property cannot be imputed to defendant.

No. 20. If you shall find that the certificate of stock sued for in this action was placed with the Cashier of the defendant bank, by the husband of the plaintiff as security for money owing to the bank by the said husband and that at the time, the said Cashier of the said defendant Bank believed that the husband of the plaintiff was the owner of said certificate and that said Cashier had no notice or knowledge of any claim or interest in said certificate belonging to the plaintiff then you will find for the defendant.

No. 21. I instruct you as a matter of law that where a married woman places title to property, as in this instance a certificate of stock, in her husband, and the husband places such property in the hands of the defendant bank as collateral for money that he received from the said bank or for renewals of notes for money that he received, and that the bank had no notice of the wife's interest in the certificate of stock, that in that event your verdict should be for the defendant.

No. 22. A married woman cannot claim against the holder
70 of collateral the rights of a surety when her husband had the title to the property that he placed in the hands of the defendant as collateral, and where there is nothing to put the holder of the collateral on notice of the wife's equitable interest in the property.

No. 23. I instruct you as a matter of law that where a bona fide purchaser of a non-negotiable security, from one upon whom the owner thereof has conferred the apparent ownership, obtains a good title against the owner as the owner is estopped from asserting her true title against such bona fide purchaser. And I instruct you that the defendant in this case is treated and should be treated by you as a purchaser of the stock involved in this case.

No. 24. I instruct you that as a matter of law there is a well established principle that where the true owner of property holds out another or permits or allows to appear as the owner of or as having full power of disposition over, property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner, which precludes the real owner from disputing, as against a third party, the existence of the title or power which he caused or allowed to appear to be vested in the party making the sale or placing the property in the hands of the third party as collateral to a debt; and I further instruct
71 you as a matter of law that this rule applies to a married woman.

And the court gave instructions numbered as aforesaid No. 1, 2, 3, 4, 6, 7, 8, 9, 11, 12, 13, 14, 15, 19, 20 and refused to give each of

said instructions so tendered numbered 5, 10, 16, 17, 18, 21, 22, 23, 24, and to the refusal of the court to give each one of said instructions numbered 5, 10, 16, 17, 18, 21, 22, 23, 24 the defendant at the time excepted.

And the following further proceedings were had at said trial. The plaintiff tendered in writing before argument the following instructions, to wit:

No. 1. This is an action brought by the plaintiff, Mary Opperman, against the defendant, Citizens Bank of Michigan City, Indiana, to receiver the possession of Certificate No. 385 for fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana. It is alleged in part in the complaint that the plaintiff is the owner and entitled to the possession of said Certificate, and that the defendant at the commencement of this action had possession of said certificate without right, and unlawfully detained the same.

In the defendant's answer it denies the allegations of the plaintiff's complaint.

No. 2. The burden of proving all the material facts alleged in plaintiff's complaint rests upon the plaintiff, and she must establish such facts by a fair preponderance of all the evidence.

72 No. 3. By a fair preponderance of the evidence is meant, not the mere number of witnesses upon one side or the other, but that evidence which is most convincing and satisfying to the mind of the jury, and in determining upon which side the preponderance of the evidence is, the jury may take into consideration the opportunities of the several witnesses of seeing and knowing the things about which they testify, their interest, if any, or want of interest, if any, in the result of the suit, the probability or improbability of the truth of the several statements in view of all the evidence, and the circumstances appearing upon the trial, and upon all these circumstances determine the weight and preponderance of the evidence.

No. 4. The statutory law of the State of Indiana provides that "a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner, and such contract as to her, shall be void," and if you find from the evidence that Mary Opperman was the owner of the certificate here in controversy and while she was so the owner, her husband, with her consent, placed the same in the possession of defendant to secure the payment to defendant of indebtedness due or to become due it from said husband, then I instruct you said arrangement constituted said Mary Opperman as surety and under the statute was void as to her, and after proper demand made by her on defendant, she was entitled to regain possession of said certificate and is entitled to your

73 verdict, unless she became estopped as hereinafter explained.

No. 5. The defendant contends that the plaintiff is estopped to claim ownership, and demand possession of the Certificate of stock in question, because she signed the certificate of stock in blank, and delivered said certificate of stock to her husband, Henry F. Opperman, and permitted him to take said certificate to the defendant, and represent to the defendant that he, the said Henry F. Opperman,

was the owner thereof, which representation the defendant contends, that it, through its cashier, Charles E. Arnt, then believed to be true, and accepted said Certificate as security, upon the statement of said Henry F. Opperman, not knowing the same to be false, and not knowing that Mary Opperman owned the Certificate of stock in question. The burden of proving the facts constituting this estoppel rests upon the defendant, because of such estoppel, the defendant must prove by a preponderance of all the evidence in the case that the facts constituting such estoppel existed; that the defendant did not know, or have reason to know that Mary Opperman was the true owner of said Certificate of stock at the time it was accepted as security, by the defendant.

No. 6. The burden is on the defendant to establish the facts constituting an estoppel. The elements of such an estoppel are as follows, viz: First. That there was a misrepresentation or concealment of material facts; Second. That the misrepresentation
74 was made with knowledge of the facts; Third. That the party to whom it was made was ignorant of the truth of the matter; Fourth. That it was made with the intention that the other party should act upon it, and Fifth. That the other party was induced to act upon it, to his injury.

No. 7. The plaintiff cannot be estopped from maintaining this action and asserting the right to regain possession of said certificate, if, at the time said certificate was placed in the possession of defendant, its cashier, Mr. Arnt, knew said certificate belonged to plaintiff, or if the facts of the transaction shown by the evidence, through which the defendant bank got the certificate were such as would put a prudent man upon inquiry, and which inquiry, if followed out, would lead to knowledge that plaintiff owned said certificate. "Where one has knowledge of facts sufficient to excite the attention of a person of ordinary prudence and put him upon further inquiry, he is required to make such inquiry in good faith and with diligence, and in the absence of so doing, he will be charged with the knowledge of the particular point or fact which such inquiry would have revealed or imparted."

No. 8. If you believe from the evidence that the plaintiff, in this case, at the time the suit was commenced, was lawfully entitled to the immediate possession of the Certificate of Stock, described in the complaint, and that the defendant had the same in its pos-
75 session, and that a demand was made, and a refusal to deliver the same up, by the defendant, you will find for the plaintiff.

No. 9. In determining the weight to be given to the testimony of a witness you may take into consideration the intelligence of the witness, the circumstances surrounding the witness at the time questioned, his interest, if any, in the result of the suit, his bias or prejudice, if any, his manner, the reasonableness or unreasonableness of his testimony, whether negatively or affirmatively, and all matters and facts and circumstances shown on the trial, upon the question of the weight to be given to his testimony, and give the question of the

weight to be given to his testimony, and give to the testimony of each witness such weight as to you it may seem fairly entitled to.

No. 10. If you find under the evidence and rules of law—have given you that the plaintiff is entitled to recover, it will be your duty to find the value of the Certificate of Stock in question, and to enter the value thereof in the form of verdict which will be furnished you.

No. 11. If you return a verdict for plaintiff you should state therein the value of the property in controversy. That is to say, the now present value of the fifteen shares of the capital stock of the First National Bank of Michigan City represented by the Certificate in evidence, together with the accrued dividends thereon as shown by the evidence.

No. 12. If you find from the evidence that the plaintiff
76 Mary Opperman, signed the assignment on the certificate of stock in question and delivered it to her husband for the sole purpose of having him deposit it with the defendant Bank as security for a debt owing by her husband to the defendant Bank and you further find that her said husband did deposit the certificate with the bank as security for his debt, then the transaction constituted a contract of suretyship on her part, as surety for her husband's debt.

No. 13. In order to create a contract of suretyship on the part of a married woman, it is not necessary that she enter into any express agreement, either in writing or by parol, with the holder of the debt; but whenever the result of the transaction is such as to impose upon her property a liability to answer for the debt of another, she must be regarded as a surety and entitled to the protection of the statute.

When a married woman pledges her separate property to secure the debt of another, she occupies the position of a surety within the statute, whether she be a party to any written contract or not.

No. 14. If you find from the evidence in this case that the plaintiff is the owner and entitled to the possession of the property described in the complaint, and if you further find from the evidence that since the certificate of stock described in the complaint has been unlawfully in the possession of said defendant, that dividends have accrued on said stock and which have been withheld from the plaintiff
77 on account of defendant's possession of said stock, since a demand was made by plaintiff therefor—if any such demand you find—then I instruct you that the measure of plaintiff's damages for the detention of said property is interest at the rate of six per cent per annum on said dividends so withheld, computed from the dates of the accuring of said dividends respectively to the date of this trial; and if you should find that said dividends have not been so withheld then plaintiff would only be entitled to nominal damages for such detention.

No. 15. The Court will submit to you certain interrogatories or questions: These interrogatories you are required to answer clearly and plainly and without evasion. The word "Ans." appears after each interrogatory, and is followed by a line, and you will write the answer to each interrogatory on the line following the word "Ans."

In answering the interrogatories, you should answer each one according to the preponderance of the evidence bearing upon the

particular fact called for by the interrogatory. When you shall have done that, you will have discharged your full duty. You should not make any effort to make answers to the interrogatories harmonize with your general verdict, whatever that may be. You are simply to answer each interrogatory according to the fact as you may find it by a preponderance of the evidence.

And the court gave to the jury of said instructions numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 to the giving of each
78 one of said instructions the defendant at the time excepted.

And now *in* the 28th day of January, 1913, the same being the 32nd Juridical day of the December Term, 1912 of said court, the defendant presents this its true bill of exceptions on the instructions and requests the court to sign and seal the same, and make the same a part of the record in said cause which is accordingly done this 28th day of January, 1913.

ARTHUR L. HUBBARD,
Judge of the St. Joseph Superior Court.

79 And, be it remembered, That afterwards, to wit, on the 31st day of January, 1913, the same being the 35th Judicial day of the December Term, 1912 of said Court began and held as aforesaid, the following further proceedings were had in the above entitled cause, to wit:—

#799.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, IND.

Comes now the defendant herein by counsel and files a motion for a new trial of this cause, which motion is as follows, to wit:—

Defendant's Motion for New Trial.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, IND.

The defendant in the above entitled cause moves the Court for a new trial upon each of the grounds following, to-wit: For errors of law occurring upon the trial of said cause, and each of them, as follows:

1. The Court erred in overruling the defendant's objection to the question put to the witness, Henry A. F. Opperman, by the plaintiff, to wit: "Who, if anybody, gave her any directions as to writing her name on it."

Ans. "I did."

2. The Court erred in overruling the defendant's objection to the following question put by the plaintiff tosaid Henry A. F.Opperman:

"At the time you got this certificate of stock from your wife,
80 did you give her any money or *or* anything else for it."

Ans. "I didn't."

3. The Court erred in overruling the defendant's motion to strike out the answer to the following question put by the plaintiff to the witness, Henry A. F. Opperman, which question and answer thereto are as follows:

"At the time you got this certificate of stock from your wife, did you give her any money or anything el*s*t for it."

Ans. "I didn't."

4. The Court erred in overruling the defendant's objection to the following question put to the witness, Henry A. F. Opperman, by the plaintiff:

"At the time you got this certificate of stock from your wife and gave it to Mr. Arnt at the Citizens' Bank, did your wife receive anything from the bank for it."

Ans. "No."

5. The court erred in overruling the defendant's objection to the following question put to the witness, Henry A. F. Opperman, by the plaintiff:

"Was this money that you borrowed of the Citizens' Bank and for which the stock was put up as collateral used, or any part of it used to pay any debt of your wife's."

Ans. "It was not."

6. The Court erred in overruling the defendant's objection to the following question put to the witness, Henry A. F. Opperman, by the plaintiff:

"Do you know where your wife got that stock."

81 7. The Court erred in overruling the defendant's objection to the following question put to the witness, Rudolph A. Krueger:

"Since your recollection has been refreshed what would you now say as to having at any time received any of those dividends for your sister."

8. The Court erred in overruling the defendant's objection to the following question put to the witness, Charles Arnt, by the plaintiff, to wit:

"And it was never transferred on the books of the First National Bank from Mrs. Opperman's name either, was it."

9. The Court erred in overruling the defendant's objection to the following question put to the witness, G. F. Kreidler, by the plaintiff:

"Has the First National Bank of Michigan City a set of by-laws."

Ans. "Yes sir."

10. The Court erred in overruling the defendant's objection to the following question put to the witness, G. F. Kreidler, by the plaintiff:

"I will ask you whether or not the by-laws as shown upon the pages you have mentioned are the by-laws which have been used

by that bank in connection with its business during your connection with that bank."

Ans. "Yes sir."

11. The Court erred in overruling the defendant's objec-
82 tion to the following question put to the witness, G. F. Kreidler, by the plaintiff:

"After the meeting on June 8, 1882, as shown by the record on page 25 is there a record of a subsequent meeting showing any action in relation to by-laws. If so, on what page is the record of that meeting."

Ans. "On Page 26 there is a report——

12. The Court erred in overruling the defendant's objection to the introduction of evidence displayed on page 25 of the record book of the First National Bank of Michigan City.

13. The Court erred in overruling defendant's objection to the introduction of evidence at page 26 of the record page of the First National Bank of Michigan City, Indiana.

14. The Court erred in overruling the defendant's objection to the introduction in evidence of page 22 of the record book of the First National Bank of Michigan City, Indiana.

15. The Court erred in overruling the defendant's objection to the following question put by the plaintiff to the witness Mary Opperman:

"and when he asked you for it did he tell you what he wanted to do with it."

Ans. "Yes."

16. The Court erred in overruling the defendant's objection to the following question put to the witness, Mary Opperman:

"What did he say that he wanted with it."

Ans. "As security."

83 17. The Court erred in overruling the defendant's motion to strike out the following answer to the following question put to the witness, Mary Opperman, by the plaintiff:

"What did he say that he wanted with it."

Ans. "As security."

18. The Court erred in overruling the defendant's objection to the following question put to the witness, Mary Opperman, by the plaintiff:

"You say he said he wanted to use it as security."

19. The Court erred in overruling the defendant's objection to the following question put to the witness, Mary Opperman, by the plaintiff:

"You say he said he wanted to use it as security. What, if anything, did he say at the same time as to where or with whom he was going to use it as security."

20. The court erred in overruling the defendant's objection to the following question put to the witness, Mary Opperman, by the plaintiff:

"Notice the question, Mrs. Opperman: what if any thing did he say."

21. The Court erred in overruling the defendant's motion to

strike out the following answer to the following question put to the witness, Mary Opperman, by the plaintiff:

"Notice the question, Mrs. Opperman: What if anything did he say."

Ans. "He said he wanted it as security to a loan of some money at the Citizens' Bank."

84 22. The court erred in overruling the defendant's objection to the question put to the witness, Mary Opperman, by the plaintiff, which is as follows:

"And when he brought it back what did he say to you about the way you had signed it."

Ans. "That I hadn't signed it in the right place."

23. The court erred in overruling the defendant's motion to strike out the following answer to the following question put to the witness, Mary Opperman, by the plaintiff:

"And when he brought it back what did he say to you about the way you had signed it."

Ans. "That I hadn't signed it in the right place."

24. The court erred in overruling the defendant's objection to the following question put to the witness, Mary Opperman, by the plaintiff:

"Did he ever at any time give you any money or anything else for it."

25. For misconduct of plaintiff's counsel in the closing argument of said cause in this to wit: Frank E. Osborn in the closing argument to the jury in said cause as a part of his argument at said time stated to the jury the following and the objections and exceptions were taken thereto by the defendant and the ruling of the court thereon were as follows:

Mr. Osborn: Let me call your attention to Mr. Arnt's testimony when I asked him about a certain conference with his board of directors after this suit had been commenced: "And in that conference the board of directors and particularly a Mr. Pitch

85 said to you in substance that this stock should be surrendered and the litigation stopped, didn't he. And you said in reply that you didn't care what the board of directors thought; if they didn't want to continue the litigation you would, at your expense, before you would ever stop it."

Mr. Drummond: I object to that; counsel put an impeaching question; the witness denied it; now your honor that ends it until they bring in this third party to testify to what he said.

Objection overruled; exception by defendant.

Mr. Osborn: Now he didn't say nothing of that kind ever occurred; he didn't say that he didn't threaten to continue that litigation himself, but the only answer that he made to that question was this:

Mr. Drummond: We object to counsel quoting witness' answer.

Objection overruled; exception by defendant.

Mr. Osborn (continuing): "Mr. Peach never requested me to return the stock." and a little farther on: "Q. Is that your answer.
A. "Yes, that is my answer."

Mr. Drummond: Now, the defendant moves the court to instruct the jury that they shall not consider the statement read by counsel to them nor any of his comments thereon, and as a ground for said motion defendant states to the court that the question read to the witness was read as a matter of impeachment and that the person to whom the statement is alleged to have been made, as
86 read by counsel, was not produced upon the stand.

Objection overruled; exception by defendant.

Mr. Osborn: You will notice, gentlemen, that in that answer he didn't deny, or say anything to the part of the question that I asked him about his threat to continue the litigation himself; he didn't deny but that other of the directors had told him to end the litigation and surrender the stock. The intimation was that my information was limited by not knowing which of the directors it was that said it. The answer was that Mr. Peach didn't say it.
Mr. Drummond: Counsel for the defendant excepts to the remarks of counsel for the plaintiff just made and objects to the same, and objects to any further remarks upon the subject matter before the jury.

Objection overruled; exception by defendant.

At the completion of Mr. Osborn's argument to the jury said jury was given a recess by the court; whereupon the following motion was made by counsel for defendant, in the absence of the jury.

Mr. Drummond: I want to renew my motion to the court to instruct the jury to disregard the reading of the statement that was read to the jury by counsel for plaintiff and his remarks in connection therewith for the reason that it is elementary that where a witness is asked in court if he has made a different statement out of court prior to that time to a certain person and the witness
87 says that he didn't make the statement, that is the end of the matter unless the person to whom he is alleged to have said it is produced in court and states that the statement was made to him as read and as stated to the witness whom it is the purpose to impeach.

The court declines to so instruct the jury.
Exception by defendant.

26. The court erred further in the particulars, to wit: The court erred in refusing to sustain the objection of the defendant to plaintiff's counsel reading to the jury in his closing argument in said cause and making comments thereon, as follows:

Mr. Osborn: Let me call your attention to Mr. Arnt's testimony when I asked him about a certain conference with his board of directors after this suit had been commenced: "And in that con-

ference the board of directors and particularly a Mr. Pitch said to you in substance that this stock should be surrendered and the litigation stopped didn't he. And you said in reply to that that you didn't care what the board of directors thought; if they didn't want to continue the litigation you would, at your expense, before you would ever stop it."

Mr. Drummond: I object to that; counsel put an impeaching question; the witness denied it; now your honor that ends it until they bring in this third party to testify to what he said.

Objection overruled; exception by defendant.

88 Mr. Osborn: Now he didn't say nothing of that kind ever occurred; he didn't say that he didn't threaten to continue that litigation himself, but the only answer that he made to that question was this:

Mr. Drummond: We object to counsel quoting witness' answer.

Objection overruled; exception by defendant.

Mr. Osborn (continuing): "Mr. Peach never requested me to return the stock," and a little farther on: "Q. Is that your answer. A. Yes, that is my answer."

27. The court erred in refusing to instruct the jury that they should not consider the statement read to them or any of the comments thereon as appear and as recited in the above and foregoing error Numbered twenty six.

28. And the court erred in overruling the defendant's motion to the court to instruct the jury to disregard the reading of the statements that were read to the jury by the counsel for the plaintiff and his remarks in connection therewith in his closing argument to the jury which statements to the jury in said closing arguments and comments thereon were as follows, to wit:

"Let me call your attention to Mr. Arnt's testimony when I asked him about a certain conference with his board of directors after this suit had been commenced; "And in that conference the board of directors and particularly a Mr. Pitch said to you in substance that this stock should be surrendered and the litigation stopped, didn't he. And you said in reply that you didn't care what the

89 board of directors thought; if they didn't want to continue the litigation you would, at your expense, before you would ever stop it."

Now he didn't say anything of that kind ever occurred; he didn't say that he didn't threaten to continue that litigation himself, but the only answer that he made to that question was this: "Mr. Peach never requested me to return the stock," and a little farther on: "Q. Is that your answer. A. Yes, that is my answer."

You will notice, gentlemen that in that answer he didn't deny or say anything, to the part of the question, that I asked him about his threat to continue the litigation himself; he didn't deny but that other of the directors had told him to end the litigation and surrender the stock. The intimation was that my information was

limited by not knowing which of the directors it was that said it. The answer was that Mr. Peach didn't say it."

29. The court erred in refusing to strike out each one of the interrogatories tendered to the court by the plaintiff with the request that the jury be required to answer the same and each one of them in the event they returned a general verdict to wit: 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 60, 61, 62, 63, 64, 66, 73, and 74.

30. The court erred in refusing to give to the jury each one of the following numbered instructions tendered to the court by the defendant, to wit: 5, 10, 16, 17, 18, 21, 22, 23 and 24.

90 31. The court erred in giving to the jury each one of the following numbered instructions tendered by the plaintiff in the above entitled cause, to wit: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.

a.

The verdict of the jury is not sustained by sufficient evidence.

b.

The verdict of the jury is contrary to law.

COLLINS & COLLINS,
DRUMMOND & DRUMMOND,
Attys. for Deft.

And be it remembered, That afterwards, to wit, on the 29th day of May, 1913, the same being the 10th Judicial day of the May Term, 1913 of said Court began and held as aforesaid the following further proceedings were had in the above entitled cause, to wit:

Motion to Modify Judgment Overruled.

#799.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY.

Come now again the parties herein by counsel and the defendant's motion to modify the judgment herein is now overruled by the Court, to which ruling of the Court the defendant excepts. And defendant's motion for a new trial herein, is now overruled by the Court, to which ruling of the Court the defendant excepts, and 90 days is now given for the filing of a Bill of Exceptions upon the ruling of the Court to modify the judgment herein. And de-

91 fendant is to have 90 days for the filing of a Bill of Exceptions.

Bond Fixed.

And defendant now prays an appeal to the Appellate Court, which is granted upon the filing of a Bond within 30 days from this date, in the sum of $5,000.00 with Charles Arnt as surety thereon, which surety is approved by the Court.

92 Filed Aug. 7, 1913. Frank P. Christoph, Clerk St. Joseph Circuit Court.

STATE OF INDIANA,
St. Joseph County, ss:

In the St. Joseph Superior Court.

No. 799.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, INDIANA.

Bill of Exceptions.

Be it remembered, that heretofore, to-wit, on the 14th day of January, 1913, the above entitled cause came on for trial before the Hon. Arthur L. Hubbard, pro tempore Judge of said court and a jury: that upon the trial of said cause the following oral, written and documentary evidence was delivered and the following rulings of the court in respect to the admission and rejection of evidence and the objections and exceptions thereto and the competency of witness were made and taken as noted and that a verbatim report of such evidence and the rulings, objections and exceptions thereon and thereto was *as* the time made by an official court reporter, to-wit, Frank Batson, of which evidence, rulings, objections and exceptions so made and taken the following is the original long hand manuscript as the same was made and filed.

93 *Henry A. F. Opperman—Direct Examination.*

HENRY A. F. OPPERMAN, a witness called on behalf of the plaintiff, being first duly sworn, was examined by Frank Osborn and testified as follows:

Direct examination.

By Frank Osborn:

Q. You may state your full name, Mr. Opperman.
A. Henry A. F. Opperman.
Q. Where do you live?

A. Michigan City, Indiana.
Q. How long have you lived in Michigan City, Indiana?
A. Fifty-six years.
Q. How old are you?
A. Sixty.
Q. And what relation do you bear to the plaintiff in this case, Mary Opperman?
A. I am her husband.
94 Q. When were you and the plaintiff married?
A. In 1877.
Q. At Michigan City?
A. Michigan City—yes.
Q. In what business, if any, were you engaged along from 1900 to 1905?
A. Dry goods business.
Q. Are you acquainted with Mr. C. E. Arnt?
A. I am.
Q. What position did he occupy, and what was he doing along those years?
A. He was cashier of the Citizens Bank of Michigan City.
Q. The defendant in this case?
A. Yes.
Q. And were you doing any business with that bank during that time?
A. I was.
Q. Did you have an account at that bank?
A. Yes sir.
Q. Did you borrow any money at that bank?
A. Yes.
Q. About how much money were you owing that bank sometime during the summer or early fall of 1905?
Q. $3,600; a little over $3,600.
Q. Up to some time that summer did the bank hold any security for that indebtedness?
A. They held my notes.
Q. They held your notes?
A. Yes.
Q. What was your wife's name prior to your marriage?
A. Mary Krueger.
Q. Did you know of her acquiring any stock in the First National Bank at any time?
A. I did.
Q. Do you know about when it was she got that?
A. No, not exactly; after the estate was settled up after her mother's death.
Q. Now, since you and the plaintiff, Mary Opperman, were married I will ask you whether or not you have always lived together as husband and wife.
95 A. We have.
Q. How long have you known Mr. Arnt?
A. I have known him a number of years.

Q. During this time when you were doing business with them, from 1900 to 1905, who was the president of the bank?

A. W. B. Hutchinson.

Q. For how long had you known him?

A. I have known him for a good many years.

Q. Now then, during the summer of 1905 what, if anything, was said to you by Mr. Arnt or Mr. Hutchinson about the indebtedness you were then owing to the Citizens Bank?

A. Asked for more security for the loan.

Q. Who asked you?

A. Mr. Arnt, the cashier.

Q. Where were you at the time he asked you if you didn't have some security you could put up for that loan?

A. In the bank.

Q. Citizens Bank?

A. Yes.

Q. What is your best recollection as to when that was—what time of the year?

A. I couldn't just say; it was prior to—it was in July, 1904, I think.

Q. Have I got that year wrong?

A. I am not positive as to the date.

Q. I may have been given the wrong year there, perhaps; I guess that was 1904; yes, I was mistaken as to the year there. Have you got anything that will give you that?

A. No, I haven't; some other items I have here.

Q. Well, now, so we can get it straight, this talk with Mr. Arnt about giving security for the note that you had there—was that in 1904 instead of 1905, as I asked?

96 A. 1904—yes.

Q. Then this indebtedness that you spoke of—that you testified was $3,600—was that in 1904 instead of 1905 as I had it?

A. Same year—yes.

Q. Now, at the time when he asked you if you couldn't put up some security for that indebtedness of yours to the bank what did you say to him?

A. What is that?

Q. What did you say to him or he to you about what security you might put up?

A. I told him I thought I might get my wife's bank stock to put up as security.

Q. Do you know whether Mr. Arnt knew at that time that your wife had some stock in the First National Bank?

A. I think not.

Q. When you told him that you might possibly get your wife's bank stock what did he say?

A. He said all right.

Q. Do you remember any more of the conversation that occurred there between you at that time?

A. No sir.

Q. When you told him that you thought possibly you might get

your wife's bank stock and he said that would be all right what else did he say about getting it, if anything?

A. "Well get it and put it up for security."

Q. Did he say that?

A. Yes; and I got the stock and put it up for the debt I owed him.

Q. What did you do then?

A. I went to my wife and told her——

The defendant objects to the question for the reason that the defendant is not bound by any conversation between Mr. Opper-
97 man and the plaintiff.

The Court: That is all right that far.

A. (Continuing:) —told her I would like to have the stock to put up as security.

The defendant moves to strike out what he said.

The Court sustains the motion.

The plaintiff excepts.

Q. You say you went to your wife; where was your wife at that time?

A. At home.

Q. Where in Michigan City?

A. Michigan City—yes.

Q. How far were you living at that time from the Citizens National Bank?

A. It is about two blocks.

Q. For how long had you lived there?

A. Nearly ever since I have been married.

Q. You say you went back to the house: and what, if anything, did you get when you went back to the house?

A. My wife's stock.

The defendant moves to strike out the conclusion: "My wife's stock."

The Court sustains the motion.

The plaintiff excepts.

Q. You used the expression that you got your wife's stock: did you get a paper of some kind?

The defendant objects to the question for the reason that it uses the language that the court has stricken out.
98 The Court sustains the objection as to what he said.

Q. Did you get a paper of some kind?

A. I did.

Q. Now, what was that paper?

A. First National Bank stock.

Q. How many shares of stock did it represent?

A. Fifteen shares.

Q. You say First National Bank stock?

A. First National Bank of Michigan City Stock.

Q. Whose name was in that certificate of stock?
A. Mary Opperman's
Q. That is your wife?
A. My wife—yes.
Q. Where was that paper kept before you got it on that day?
A. In my house; my wife had it in her house.
Q. When you went to the house did you have some conversation with her?
A. Yes sir.
Q. After having a conversation with her what, if anything, did she do in the way of getting this paper?
A. She signed *in* on the back—indorsed it.
Q. My question is: what if anything did she do in the way of getting it.
A. She went upstairs and got it; it was in a tin box, I believe.
Q. She kept it in a tin box upstairs?
A. Yes.
Q. And when she got it, then what did she do with it?
A. She indorsed it.
Q. When you say indorsed it you mean wrote her name on the back of it?
A. Yes.
Q. And then what did she do with it?
99 A. Handed it over to me.
Q. Who, if anybody, gave her any directions as to writing her name on it?

The defendant objects to the question upon the ground that the bank is not bound by the talk and directions given by any conversation to Mrs. Opperman in their absence and they have not shown that they were present or that they gave any directions.
The court overrules the objection.
The defendant excepts.
A. I did; or rather I was directed to tell her.

The defendant moves to strike out the answer for the reason that the defendant is not bound by the directions or the talk of the husband of the plaintiff, Mrs. Opperman, such directions and talk having taken place in the absence of the defendant.
The court overrules the motion.
The defendant excepts.

Q. I will ask you first, Mr. Opperman; was there some printing on the back of this certificate?
A. There were lines there—yes sir.
Q. Was there a line along just below the bottom of the printing on the back of that certificate?
A. Pretty close to the bottom.
100 Q. Now then, at the time when your wife first signed this paper there at the house when you say you went and got it, where did she sign it with reference to that line?

A. It was above the line.
Q. After she had signed her name, then what did you do with that certificate?
A. Took it to the bank and handed it over to Mr. Arnt.
Q. Was that the same day?
A. Same day.
Q. And after you took it to the bank and gave it to Mr. Arnt what did Mr. Arnt do with it?
A. Looked it over and handed it back and said it wasn't properly signed.
Q. What, if anything, did he say to you at that time as to where it should be signed?
A. On the dotted line.
Q. What, if anything, did he say to you about having it signed on the dotted line?
A. He told me to return it and have my wife sign it on the line.
Q. Then what did you do?
A. Took it back to the wife and she signed *in* on the place indicated.
Q. That is, on the dotted line?
A. Dotted line.
Q. After your wife had signed it, then, on the dotted line, then what did you do with it?
A. Took it back to the bank.
Q. What did you do with it there?
A. Handed it to Mr. Arnt.
Q. What did he do with it——
A. Well, he took possession of it.
101 Q. Now, at that time do you remember of his making out a collateral note for you to sign?
A. I do—yes.
Q. Have you got that note?

It i sagreed by and between the parties that it is a fact that the original certificate has been lost or misplaced in some way while this suit has been pending, so it cannot be produced now.

Q. I will ask you to look at the paper I will now hand you and have marked for identification "Plaintiff's Exhibit No. 1," and state if you will, if that is the paper which you signed at the time you say you delivered the stock to Mr. Arnt at the bank.

Plaintiff's Exhibit No. 1 marked for identification by the reporter.

A. That is my signature.
Q. Is that the paper you signed at that time?
A. Yes sir.

The plaintiff offers in evidence paper marked "Plaintiff's Exhibit No. 1," and the same is read in evidence as follows:

PLAINTIFF'S EXHIBIT No. 1.

"This is to certify, That the undersigned has deposited with the Citizens Bank of Michigan City, Indiana, the following described personal property, to wit:

Certf. No. 385. Capt. Stock of the First Nat. Bank of Michigan City to be held by said Bank as collateral security for the payment of any and all sums, however evidenced," "whether by promis-
102 sory note, draft, overdraft or otherwise, whether as maker, indorser or surety, now owing or which may hereafter be owing to said Bank by the undersigned, either individually or jointly, or jointly and severally with any other person or persons, to include any and all renewals of promissory notes or new promissory notes or other obligations accepted in payment of former obligations.

The said Bank, or its assigns, shall have full power and authority, upon the maturity of any obligation secured by said collateral, or at any time thereafter or before, at its discretion, or in the event of said securities depreciating in value, to collect or otherwise convert said securities, or either or any part of them or any substitutes therefor, or any additions thereto, or to sell the same, or any part thereof, at public or private sale, at the discretion of said Bank, without advertising the same or otherwise giving public notice or to the undersigned (and the said Bank may become the purchaser at any public sale). The said Bank shall apply the proceeds realized from said collateral, or any part thereof so collected, converted or sold, after the payment of all expenses and attorney's fees attending said collection, conversion or sale thereof, to the payment of any obligation secured thereby, with all interest due thereon, and return the overplus,
103 if any, to the undersigned. In case the proceeds of said collection, conversion or sale of said collateral security shall not cover the principal, interest and expenses, the undersigned promises to pay the deficiency forthwith; all sales or other disposition of said collateral to be without relief from valuation or appraisement laws.

The undersigned waives all claims or defenses on the ground of lack of diligence of said Bank in making collection of said collateral, or sale, or conversion thereof, and it shall not be bound to so proceed, unless directed in writing so to do by the undersigned.

Dated at Michigan City this 19th day of Sept. 1904.

H. A. F. OPPERMAN.

Copy."

Whereupon, it being 12 o'clock, noon, the court took a recess until 1:30 in the afternoon.

1:30 o'clock p. m., January 14, 1913.

Trial resumed, with HENRY A. F. OPPERMAN recalled to the stand for further direct examination by Frank Osborn.

Q. Now, Mr. Opperman, at the time you gave this certificate of stock, which I believe is mentioned in this collateral agreement as

certificate number 385, did you receive any money from the Citizens Bank?

The defendant objects to the question for the reason it is
104 immaterial for him to deny any specific consideration.

The court overrules the objection.

A. No.
Q. Did your wife receive any money at that time?
A. No sir.
Q. Now, at the time of giving this certificate of stock, No. 385 mentioned in the collateral agreement, to Mr. Arnt of the Citizens Bank I believe you say you were indebted to the bank about $3,600?
A. Yes.
Q. And when had that indebtedness been incurred?
A. The first loan I made was in February—February 17, 1903.
Q. How much was that?
A. $500.
Q. Now, with reference to that $500: what was done with that $500—the first $500 that you got there?
A. I used it in my business.
Q. What business was that?
A. Dry goods business.
Q. And you say you used it in your business: In what way did you use it in your business?
A. Paying my bills and paying for merchandise.
Q. Did you keep a bank account in connection with your business?
A. Yes.
Q. At what bank did you keep a bank account?
A. I had an account with the First National Bank and with the Citizens Bank.
Q. Take this first $500 that you borrowed there: how was that done? Did you get the money for that or was it placed to your credit in the Citizens Bank?
105 A. Placed to my credit.
Q. Then when you paid it out how did you pay it out—by check or did you draw out the money?
A. Checks; procured drafts to send to the different firms I was remitting money to.
Q. When was the next item?
A. April 30.
Q. What year?
A. 1903.
Q. How much did you get at that time?
A. $1,000.
Q. Did you give a note for that $1,000?
A. Yes sir.
Q. Who signed that note?
A. I did.
Q. Anybody else?
A. No.

Q. Going back to the first $500, who signed that note?
A. I did.
Q. Anybody else?
A. No.
Q. Now, when you got the $1,000 did you get the money on that or did it go to your credit?
A. It was placed to my credit.
Q. In the Citizens Bank?
A. Yes.
Q. In whose name was that bank account?
A. Henry F. Opperman.
Q. Now, what use did you make of that money?
A. Used in my business, conducting a retail dry goods business.
Q. In whose name was that business?
A. Henry F. Opperman.
Q. Now, when did you get the next money of the Citizens Bank?
A. March 7th.
Q. Of what year?
A. 1904.
Q. How much money did you get then?
A. That was $1,000.
106 Q. Did you give a note for it?
A. Yes.
Q. Who signed that note?
A. I did.
Q. Did you get the money on that note or did you get credit at the bank?
A. I got credit.
Q. Then how did you dispose of that money?
A. In the same manner I did the other: buying and paying for my bills and merchandise.
Q. Draw checks on it?
A. Drew checks.
Q. Then when was the next money?
A. July first.
Q. What year?
A. That is 1904.
Q. How much money did you get then?
A. That was $1,000.
Q. Who signed that note?
A. I did.
Q. In what way was the money passed? Did you get the cash or did it go to your credit?
A. Placed to my credit.
Q. In what bank?
A. Citizens.
Q. What did you do with that money?
A. Used it in my business, paying bills.
Q. In what way did you use it: draw it out in cash or check it out?
A. I would give them a check and they would give me a draft.
Q. And did you get any money of the bank after that?

A. July 21st.
Q. How much did you get then?
A. $129.15.
Q. What year was that?
A. 1904.
Q. That $129 and some cents—how did you get that?
A. Same way; placed to my credit.
Q. Did you give a separate note for the $129.15 or was that added to another note?
107 A. That was added to the $500 note.
Q. Then did you get a new note for the $629.
A. I did.
Q. Now, these other notes you have given there—were they renewed from time to time?
A. Yes.
Q. What did you do with his money, this $129 and some cents?
A. I checked it out the same way as I did before.
Q. What did you pay with it?
A. Paid bills for merchandise.
Q. Now, did you get any other money than those items you have mentioned, from the bank?
A. That is all.
Q. At the time that you got this certificate of stock from your wife did you give her any money or anything else for it?

The defendant objects to the question for the reason the defendant bank is not bound by the acts or transactions that occurred during his absence nor any secret agreement between the wife and the husband.
The court overrules the objection.
The defendant excepts.

A. I didn't.

The defendant moves to strike out the answer for the reason that the bank is not bound by the secret agreements between the witness and his wife, the plaintiff.
The court overrules the motion.
108 The defendant excepts.

Q. At the time that you got this certificate from your wife and gave it to Mr. Arnt at the Citizens Bank did your wife receive anything from the bank for it?

The defendant objects to the question for the reason that this is a question that calls upon the witness to decide one of the legal issues in this case.
The court overrules the objection.
The defendant excepts.

A. No.

The defendant moves the court to strike out the answer of the witness for the reason that the answer is the conclusion of the witness

and it assumes to decide for the jury one of the facts which the jury must decide from all the facts and circumstances.

The court overrules the motion.

The defendant excepts.

Q. Did your wife, at any time, receive any of this money that you borrowed of the Citizens Bank and for which this stock was put up as collateral, or was any part of it used to pay any debt of your wife's?

The defendant objects to the question.

Q. Was this money that you borrowed of the Citizens Bank and for which the stock was put up as collateral used, or any part
109 of it used to pay any debt of your wife's?

The defendant objects to the question for the reason he has specifically recited what he did with the money; this is simply cross examining him on his own statement.

The court overrules the objection.

The defendant excepts.

A. It was not.

Q. Was this money which you borrowed of the Citizens Bank and for which this stock was put up as collateral, or any part of it, used to pay for any property of your wife's or that she bought or that was bought for her?

The defendant objects to the question on the ground that this is simply cumulative and cross examining his own witness; he may ask if she bought any horse with it, any cows, any poultry, any blue sky, or anything else.

The court overrules the objection.

The defendant excepts.

A. It was not.

Q. Do you know where your wife got that stock?

The defendant objects to the question as not being material in this case, the question at issue here being the title to the stock.

The court overrules the objection.

110 The defendant excepts.

A. Yes.

Q. Where—from what source?

A. That was part of her share of the estate of her father; her father's estate.

Q. Do you remember of seeing that certificate of stock at the previous trial of this case there in Laporte?

A. Saw it at home there.

Q. What is that?

A. At home.

Q. But afterwards: take it, after you gave the certificate to Mr. Arnt at the bank—after that or at the time of the first trial of this case there in Laporte, do you remember of seeing that certificate introduced in evidence there?

A. Yes.

Q. At the time that you say that you went to the house and your wife went upstairs to get this certificate from the tin box, when she brought it down was there any indorsement on the back of it then?

A. There was not.

PLAINTIFF'S EXHIBIT No. 2.

Stipulation in Regard to Plaintiff's Exhibit No. 2.

It being admitted that the certificate of stock is lost the plaintiff now offers in evidence the copy of the certificate of stock which is copied into the certified transcript of this case which was made and certified to on the 24th day of July, 1906 and filed with the Supreme Court. It is agreed by and between the parties that the reporter may make a copy of the copy of the certificate in question which appears in said transcript and that he shall mark said copy "Plaintiff's Exhibit No. 2," and that said Plaintiff's Exhibit
111 No. 2 shall stand in the place of the certificate of stock which it is agreed is lost.

Said copy of said certificate of stock read in evidence as follows:

Plaintiff's Exhibit No. 2 Read in Evidence.

"State of Indiana.

385.

Capital Stock —.

Shares, $100.00 Each.

First National Bank of Michigan City, Indiana.

This is to Certify that Mary Opperman is entitled to Fifteen Shares of the Capital Stock of The First National Bank of Michigan City, Indiana, subject to the provisions of the National Banking Act, approved June 3d, A. D. 1864, and amendments thereto. Transferable only on the books of the Bank, in person or by attorney on the surrender of this Certificate.

In Witness Whereof, The President and Cashier have hereunto subscribed their names and caused the Seal of this Bank to be affixed at Michigan City, Ind., 20th day of August, A. D. 1904.

[Seal First National Bank of Michigan City, Ind.]

WALTER VAIL, *President.*

J. F. KREIDLER, *Cashier.*"

Indorsed on the back as follows:

"For Value Received — hereby sell, transfer and assign
112 to —— —— *B*he Shares of Stock within mentioned and authorize — to make the necessary transfer on the books of the Bank.

Witness — hand and Seal this — day of —— 190–.

X MARY OPPERMAN.

Witnessed by
MARY OPPERMAN."

Cross-examination.

By Charles P. Drummond.

Q. How long had you done business with the Citizens Bank of Michigan City, the defendant here, before——

A. 1902, I guess.

Q. Did you keep an account with them, Mr. Opperman?

A. Yes.

Q. Were you well acquainted with the cashier and the president and the officers?

A. I was acquainted with Mr. Arnt and Mr. Hutchinson, the president.

Q. How long had you known Mr. Arnt prior to that time?

A. Why, a number of years.

Q. About how many?

A. I couldn't say, ten or fifteen; might be twenty years.

Q. How long were you in the mercantile business?

113 A. All told?

Q. Yes sir.

A. Do you mean when I first entered the business?

Q. Yes; how long were you in the mercantile business in Michigan City prior to 1904?

A. I started in in 1874.

Q. Did you have occasion from time to time in the conduct of your business to borrow money?

A. Yes; I was in partnership with Clepper.

Q. It wasn't uncommon for the firm to borrow money from banks?

A. It was a common thing; occasionally.

Q. In fact it isn't uncommon for merchants to borrow money to meet their bills?

A. No.

Q. Sometimes you borrowed money in order to discount bills?

A. Some business men do.

Q. And this first loan that you got for $500, that you got of Mr. Arnt, did you transact your business with him?

A. Yes.

Q. And your relations with Mr. Arnt have always been intimate and friendly, have they not?

A. What was it about getting this money—$500?
Q. Your relations with him were friendly?
A. Do you mean by getting it, paying it outright to me?
A. He did the business, did he?
A. It was placed to my credit.
Q. Did you do the business with Mr. Arnt when you got that?
A. Why yes, he placed it to my credit on the bank book.
Q. Did you do the business with Mr. Arnt when you got the next sum which was the thousand dollars in April, 1903?
114 A. Had the transaction with Arnt personally do you mean?
Q. Yes.
A. Yes.
Q. And also the thousand dollars that you got in March, 1904—did you do that business personally with Mr. Arnt?
A. I think I did—yes; he was the cashier.
Q. And also the $500 which you got July 21, 1904, did you do that with him personally?
A. I had a talk with him about making the loan.
Q. And also the $129?
A. Yes.
Q. And at the time you got that you needed it in your business?
A. Yes sir.
Q. And you took this money—all of it—and used it to pay bills for stock that went into the store?
A. Yes sir.
Q. You were living with your wife at that time?
A. Yes.
Q. She knew you were in the mercantile business, I take it?
A. Yes.
Q. And then you did get the money when you gave those notes, didn't you, Mr. Opperman?
A. Not cash money.
Q. Well you got just as good as cash, did you not?
A. I got credit for it—yes; gave me credit on the bank book; gave me credit for it.
Q. Then you checked it out?
A. Yes.
Q. The checks were paid, weren't they, when you presented them?
A. Yes.
Q. You drew out all of this $2,600, or whatever it was——
A. Checked it out.
Q. (Continuing:) —by check, didn't you?
A. Check.
Q. And paid it over to you?
A. Well, in fact I gave them checks and they would issue
115 drafts to me and I sent on the drafts.
Q. To pay for goods?
A. Yes.
Q. Then from time to time those notes that were originally given were renewed, were they not?

A. Yes.

Q. And they were carried forward in the form of renewals until the time that you took the bank stock over to Mr. Arnt?

A. Yes.

Q. And when you delivered the bank stock, and the day that you delivered this bank stock to Mr. Arnt, you signed your name to this paper which is identified for the record as Plaintiff's Exhibit No. 1, did you not?

A. I did; that is my signature.

Q. In that you recited it was to be held by the bank as collateral security, didn't you?

A. Whatever it says there; I signed that blank form.

Q. You knew at the time that you delivered this stock, and at the time you delivered this contract, that it was on the strength of that that this debt of $3,600 and something of yours was extended and renewed, did you not?

A. I suppose so.

Q. That is a fact, isn't it?

A. I suppose so.

Q. I ask you if you didn't get an extension of time.

A. I don't know whether it was due at that time or not, when I delivered that.

Q. You do not now remember whether there was an extension of time given to you—a renewal on your $3,600 debt when you gave this paper?

A. I couldn't say whether there was any notes due at that time.

Q. You don't remember that?

A. No.

116 Q. You don't know why you gave this?

A. I know, yes, sir, I know.

Q. Didn't Mr. Arnt tell you, Mr. Opperman, that your debt was considerable larger than it was the policy of the bank to loan to one man and that they wanted you to secure the debt?

A. I don't remember that.

Q. Didn't he ask you for security?

A. He did.

Q. Didn't he tell you at that time that the debt was as large as he cared to have and let run that way without some security?

A. No, he wanted collateral; he wanted to know if I had collateral to put up—some security for the debt.

Q. It is a fact, is it not, Mr. Opperman, that after you delivered this agreement here and the bank stock to Mr. Arnt, or rather to the bank, that you did carry this same debt forward?

A. Still held my notes there; my notes were there.

Q. Yes, and you renewed them from time to time, didn't you?

A. Whenever they became due they were renewed.

Q. And then, finally, the two one thousand dollar notes were put in one note, were they not?

A. I think they were—yes.

Q. And the other thousand dollar note, with the six hundred and some dollars, were put in one note, were they not?

A. Merged—yes.

Q. Those are the notes, are they not, now, that represent the money which you got as you have testified here, and used in your business?

A. Yes.

Q. And they are not paid, are they?

117 A. Partly were paid: what I realized out of my failure.

Q. Aside from some credit of that kind they are still unpaid?

A. Yes sir.

Redirect examination.

By Frank Osborn:

Q. Mr. Drummond asked you about the extension and renewal of the notes which you have described, and about the payment of them: did you fail in business?

A. I did.

Q. Did you turn over your property, whatever you had, to your creditors?

A. I did.

Q. And was it sold and distributed among the creditors?

A. It was.

Q. And the indebtedness of yours to the bank got whatever its proportion of the proceeds were?

A. They did.

Q. The notes which you say you gave to the bank as a renewal of the two thousand dollar note—which were consolidated into a two thousand dollar note—who was that signed by?

A. By myself.

Q. And the note which you gave the bank as a consolidation of the thousand dollar note and the six hundred and twenty-nine dollars and some cents note—who was that signed by?

A. By myself.

Q. Those renewals that Mr. Opperman asked you about and you yourself described as being the note for $2,000 and the note for $1,630—what debts were they given in renewal of? (Hands papers to witness.) Look at these notes if you want to to refresh

118 your recollection as to the dates of them. Look at the date.

A. April 17 and March 29.

Q. Of what years?

A. 1905.

Q. Was one of them the 1st of March?

A. March 29.

Q. 1905?

A. 1905.

Q. Which one was that?

A. That is the $1,630 note.

Q. And the note dated April 17, 1905?

A. That is the $2,000 note.

Q. That was the $2,000 note?
A. Yes.

Recross-examination.

By Charles P. Drummond:

Q. On the 19th of September, 1904, you were conducting your store, were you Mr. Opperman?
A. When I gave them that collateral?
Q. Yes.
A. Yes.
Q. And you had quite a large store, didn't you?
A. Pretty good size; fair store.
Q. About what would it invoice, do you think, at that time?
A. I don't really remember; never took an inventory.
Q. Give us your best opinion of its value.
A. About $5,000; between $5,000 and $6,000.
Q. Do you know how much your property paid on the debts?
A. I don't know.
Q. About 40 per cent, wasn't it?
A. I couldn't say; I never learned.
119 Q. And your failure didn't take place for about six or seven months, did it, after September, 1904—fall or spring, was it?
A. I think it was the next spring.
Q. What month—do you remember?
A. I don't remember—no.
Q. Fully six months after this transaction, wasn't it?
A. Six months; I couldn't say positively.

Mr. Frank Osborn:

Q. Mr. Drummond asked you about the failure: I will ask you when the failure was with reference to the time you gave these notes for $2,000 and $1,630—the failure after the giving of those notes or before?
A. Afterwards.

Mr. Charles P. Drummond:

Q. That is the last renewal you are talking about?
A. Yes.

Mr. Frank Osborn:

Q. At the time you first took the stock—this bank stock represented by that certificate *to*. 385—to Mr. Arnt and he called your attention *of* the fact that your wife had signed it at the wrong place, what, if anything, did he mark on the back of the certificate to indicate where he wanted her to sign it?
A. A cross.

Mr. Osborn:

Q. Looking at the copy of the certificate and the indorsement on the back of it, which has been introduced in evidence, I see there is a place that looks like an X: I will ask you whether or not the cross he made on the original was at the place indicated by that letter X.
A. How is that?

Mr. Osborn:

Q. Was the cross that you say Mr. Arnt made on the back of the original certificate—was that at practically the same place
120 that this copy here shows the cross?
A. Yes.

Mr. Osborn:

Q. I believe you say that at the time you gave this certificate of stock to Mr. Arnt there at the Citizens Bank you received no money or credit: did you, after leaving that certificate of stock there at the bank, receive any money or credit from the bank?
A. I did not.

Mr. C. P. Drummond:

Q. You mean by that, Mr. Opperman, that at the time these notes were renewed and you delivered the bank stock and your collateral agreement, that at that particular time you didn't get any money: you had already got it, hadn't you?
A. I had it, certainly.

121 *Mary Opperman—Direct Examination.*

MARY OPPERMAN, plaintiff in this cause, called as a witness in her own behalf, being first duly sworn, was examined by Frank Osborn and testified as follows:

Direct examination.

By Frank Osborn:

Q. You may state your full name, Mrs. Opperman.
A. Mary Opperman.
Q. Where do you live?
A. Michigan City, Indiana.
Q. How old are you?
A. Fifty-six.
Q. You are married?
A. Yes.
Q. Who is your husband?
A. Henry Opperman.
Q. When were you married?
A. In 1877.
Q. Have you and Mr. Opperman lived together as husband and wife ever since?

A. Yes.
Q. Who was your father?
A. John Krueger.
Q. And your mother?
A. Wilhelmina Krueger.
Q. After the death of your father and your mother did you receive any bank stock from their estates?
A. Yes.
Q. In what bank?
A. In the First National Bank.
Q. Michigan City?
A. Yes.
Q. How many shares of that stock did you receive?
A. I had five shares of it—let me see—ten shares of it.
Q. Let's see, how many dollars was there of it?
A. $1,500.
Q. Now, $1,500—do you know how many shares there was of it? Do you know how much each share was?
A. My share?
Q. You say you got $1,500: do you understand about bank stock being divided into shares?
A. There was 20 shares.
Q. That is altogether?
A. Yes sir.
Q. And how many of those twenty shares did you get?
A. I got fifteen shares.
122 Q. How many?
A. Ten.
Q. You think it was ten?
A. I got $1,500.
Q. Who got the other shares?
A. My sister.
Q. How many did she get?
A. She got $500.
Q. Now then, when you got your shares did you get a paper that showed that you had some shares?
A. Yes.
Q. And who did you get that paper of?
A. My brother brought it to me.
Q. That is, your brother Rudolph?
A. Yes.
Q. And when he brought that paper to you what did you do with it?
Q. Why, kept it; kept it with the rest of the things—with my papers.
Q. Whereabouts did you put it with your papers?
A. I have a tin box that I keep my receipts and things in.
Q. In your home?
A. In my home.
Q. And after you had that certificate a while do you remember of its being taken any other place at any time?

A. After I had it at home?
Q. Yes, after you had it at home.
A. I kept it until after my husband asked for it.
Q. And when he asked you for it where were you?
A. I was at home.
Q. In your house?
A. Yes.
Q. And where was that certificate at that time?
A. Upstairs in the bedroom—my bedroom.
Q. And when he asked you for it did he tell you what he wanted to do with it?

The defendant objects to the question for the reason that the defendant is not bound by the talk and conversation of the
123 plaintiff and her husband in its absence. Second ground: that it is not bound by any secret agreement entered into by and between the plaintiff and her husband in its absence and without its *its* knowledge.
The Court overrules the objection.
The defendant excepts.

A. Yes.
Q. What did he say that he wanted with it?

The defendant objects to the question on the ground that it cannot be bound by the talk and conversation between the plaintiff and her husband in its absence.
The Court overrules the objection.
The defendant excepts.

A. As security.

The defendant moves to strike out the answer for the reason that it does not purport to say what her husband said and for the further reason that the defendant cannot be bound by the talk and conversation of the plaintiff with her husband in its absence; for the reason, second, that the defendant cannot be bound by the secret agreements made and entered into by the plaintiff and her husband in its absence.
124 The court overrules the objection.
The defendant excepts.

Q. You say that he wanted to use it as security?

The defendant objects to the question for the reason that she did not say that; for the reason that it is for the jury to say in this transaction with the facts and circumstances given, to say in what manner this stock was delivered.
Mr. Osborn: I would like to finish the question; read the question.
The reporter reads the question.

Q. What, if anything, did he say at that same time as to where or with whom he was going to use it as security?

The defendant objects to the question upon the ground, first: that the plaintiff here is estopped from denying the purport and meaning of her written power of attorney and assignment of this stock; second ground: that the defendant is not bound by the conversation called for, had in its absence, between the plaintiff and her husband; and for the reason, third: that the defendant cannot be bound in the circumstances of this case by the secret and undisclosed arrangements or agreements or statements entered into in the absence of the defendant or any of its officers.

The court overrules the objection.

125 The defendant excepts.

A. Yes, he did.

Q. Notice the question, Mrs. Opperman: what, if anything, did he say?

A. He said he wanted it as security to a loan of some money at the Citizens Bank.

The defendant objects and moves to strike out the answer for the reason, first: that the plaintiff is estopped from making that statement by reason of the fact that it appears in evidence that she signed and delivered a written assignment of this bank stock in which was contained a power of attorney to transfer it on the books of the bank; for the reason, second: that the defendant can not be bound by the statement made in its absence and in the absence of any of its officers; and third: that the defendant is not bound by any secret agreement or arrangement or understanding or statement made by the husband of the plaintiff and the plaintiff.

The court overrules the objection.

The defendant excepts.

Q. When you handed that paper—that certificate of stock—to your husband that day did you sign your name on the back of it?

A. Yes.

Q. When you first gave it to him?

A. Yes.

Q. And after you signed your name on the back of it, then,

126 what did he do?

A. He took it to the bank.

Q. And then afterwards did he bring it back to you again?

A. Yes, he did.

Q. And when he brought it back what did he say to you about the way you had signed it?

The defendant objects to the question, first: on the ground that the plaintiff in this case under the issues here and under the disclosure of the evidence as it has been introduced disclosing the fact that she has signed and delivered to her husband a written assignment of the bank stock in question, therein containing a power to transfer the same and use the same, is estopped from disputing the sale or transfer or the delivery; for the reason, second: that the defendant is not bound by the statements of the plaintiff or her hus-

band in its absence concerning the use to be made or any changes to be made in the certificate; and for the reason, third, that the defendant cannot be bound by any facts elicited from plaintiff or her husband which would tend to show any secret agreement between her and her husband in respect to the stock in question.

The court overrules the objection.

The defendant excepts.

A. That I hadn't signed it in the right place.

127 The defendant moves to strike out the answer of the witness for the reason that it cannot be bound by the statements of the husband to the witness, the plaintiff, in the absence of the defendant.

The court overrules the motion.

The defendant excepts.

Q. And did you then sign it again?

A. Yes.

Q. Who, if anyone, showed you where to sign it this time?

A. The question please?

Q. Who, if anyone, showed you the place to sign your name the second time you signed it?

A. Why, yes.

Q. Who was it showed you?

A. Mr. Opperman.

Q. And when you signed it the second time did you notice a mark like an X on there at the place where you signed?

A. I don't remember that.

Q. You don't remember that?

A. No, I don't.

Q. Then after you signed it the second time, then what was done with it?

A. Mr. Opperman took it to the bank.

Q. After Mr. Opperman took the certificate to the bank—no, strike that out. At the time you handed this certificate to Mr. Opperman did he give you any money or anything else for it?

A. No.

Q. Did he ever, at any time, give you any money or anything else for it?

The defendant objects to the question for the reason that it is for the jury, under proper instructions from the court to say
128 whether anything of value in the legal sense was given for the assignment and delivery of the stock and not for the witness; that covers every consideration there could possibly be.

The court overrules the objection.

The defendant excepts.

A. No.

Q. Did the Citizens Bank ever give you any money for this certificate?

A. No.

Q. Did you ever receive any money from the Citizens Bank at the time, or after you let your husband have that certificate?
A. No, I never got any money from them.
Q. Did you ever get anything for it?
A. No, I never got anything for it.
Q. Now, do you remember about how long it was before your husband took this certificate to the Citizens Bank that you got the certificate from your brother?
A. In September; I got the certificate in August.
Q. You got it from your brother in August?
A. August, yes.
Q. And Mr. Opperman got it and took it to the bank in September that same year?
A. I think the same year—yes.
Q. Now then, after this certificate was taken by Mr. Opperman to the bank did you get any dividends on it?
A. After he took it to the bank?
Q. Yes.
A. Yes, I got some dividends on it.
129 Q. Do you remember how many you got?
A. I got two.
Q. How much did you get for each of these dividends?
A. $60 each.
Q. And did you go to the First National Bank and get the dividends or did somebody get them for you?
A. I asked Mr. Opperman to get it for me the first time.
Q. And did he get it?
A. Yes.
Q. And did he give the money to you?
A. Yes.
Q. Who got it for you the second time?
A. My brother, Rudolph Krueger.
Q. And did he get it for your?
A. Yes.
Q. How did he come to get it?
A. I asked him to get it.
Q. And did he give the money to you?

A. Yes.

Cross-examination.

By Charles P. Drummond:

Q. Mrs. Opperman, at the time you signed your name on the back of this certificate of bank stock you knew that your husband was going to deliver it to the bank, did you not?
A. Yes.
Q. And you made no objection to the bank about it?
A. No.
Q. Until Mr. Osborn went over there—when was it, Mr. Osborn, you made that demand?
Frank Osborn: August 20, 1905.

The Witness: Yes, after Mr. Opperman failed.

Q. There wasn't any trouble about it until Mr. Opperman
130 failed?

A. No.

Q. And you didn't make any objection whatever to its being there until the time he failed, did you, Mrs. Opperman?

A. No.

Q. Then, when he failed, you wanted the stock back—is that right?

A. Yes.

Stipulation.

It is agreed by and between the parties to this action that this suit was commenced by filing a complaint on July 27, 1905.

It is further agreed and admitted as a fact that, prior to the commencement of this action, the plaintiff, through and by Frank E. Osborn, who was and is her attorney, notified the defendant that:

The plaintiff claimed the certificate of stock described in the complaint, namely, certificate No. three hundred and eighty-five, for fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana, of the face value of fifteen hundred dollars, and dated August 20, 1904, as her own; that she was a married woman, and the certificate of stock was only received and held by the defendant as security, and that any contract of surety as to her or on her part was void.

And demanded of the defendant said certificate of stock for and on behalf of the plaintiff; and that the defendant then and there refused to surrender or deliver said certificate of stock to the plaintiff.

And it is further admitted and agreed that the above is the statement that Frank E. Osborn made to the defendant bank.

131 *Charles E. Arnt—Direct Examination.*

CHARLES E. ARNT, a witness called on behalf of the plaintiff, being first duly sworn, was examined by Frank Osborn and testified as follows:

Direct examination.

By Frank Osborn:

Q. You may state your full name.
A. Charles E. Arnt.
Q. Where do you live?
A. Michigan City, Indiana.
Q. How long have you lived in Michigan City, Indiana?
A. About 45 years.
Q. What is your business?
A. President of the Citizens Bank.

Q. What office did you hold prior to becoming president of the Citizens Bank?

A. The office of cashier of the same bank.

Q. For how long have you been president?

A. I have been president for four years, about.

Q. For how long, prior to that time, were you cashier?

A. About twenty years.

Q. Are you acquainted with the Plaintiff, Mary Opperman, in this case?

A. Yes sir.

Q. How long have you known her?

A. Twenty years.

Q. Some twenty years?

A. Yes sir.

Q. And are you acquainted with her husband, Henry Opperman?

A. Yes sir.

Q. How long have you been acquainted with him?

132 A. About twenty years, anyway.

Q. And were they married at the time you first became acquainted with them?

A. I don't remember.

Q. You don't remember?

A. I don't remember the date of their marriage.

Q. You don't remember whether they were married before or after you became acquainted with them?

A. No, I don't.

Q. For how long have you known of their living together as husband and wife?

A. Oh, I should judge, twenty years.

Q. Ever since you have known them?

A. Since I came back to Michigan City 25 years ago.

Q. What has been your acquaintance with them during the time you have known them—known them pretty well?

A. No; just met them casually on the street; I have known Mr. Opperman because I did business with him, and Mrs. Opperman—I knew she was Mrs. Opperman, that is all.

Q. Mrs. Opperman did some business at your bank, herself didn't she?

A. She may have.

Q. Do you remember of her having, at one time, some time prior to 1904, her own account there at your bank?

A. She may have; I couldn't say positively.

Q. Do you remember when your examination was taken in this case?

A. Yes sir.

Q. And you said at that time it was your recollection she had had an account there at your bank?

A. I so stated—yes.

Q. Where did Mr. Opperman live in the year 1904, in reference to your bank?

133 A. About, I should judge, three blocks; nearly that; four blocks; something like that.

Q. Between three and four blocks of your bank?

A. Yes.

Q. Where did you live with reference to their residence at that time?

A. About a mile.

Q. So that you lived nearly a mile from your bank?

A. Yes; pretty near; not quite.

Q. Did you know John Krueger, the father of Mrs. Opperman?

A. I didn't.

Q. Did you know of him?

A. I knew of him.

Q. And for how long did you know of him?

A. Oh, I don't know; I couldn't say that—how long; I knew there was such a man as Mr. Krueger.

Q. You knew of him prior to his death, did you?

A. Yes.

Q. You also knew of her mother, did you not, Mrs. Krueger?

A. I don't remember her mother; I can't recall just now.

Q. You were cashier of the Citizens Bank, were you, during the year 1904?

A. Yes sir.

Q. And also during the year 1905?

A. Yes sir.

Q. The certificate of stock involved in this suit, being a certificate for fifteen shares of the capital stock of the First National Bank of La Porte, Indiana,—Michigan City, Indiana, rather—being certificate No. 385—did you ever see that certificate?

A. Yes sir.

Q. Where was it that you saw it?

A. I saw it at my bank.

Q. For how long was it at your bank?

A. I think about a year.

131 Q. And when did you last see it?

A. In the hands of the court stenographer at La Porte, Jennie McKeon.

Q. Do you remember about when that was?

A. I don't; seven years ago, I think; something like that.

Q. At that time it was replevined in this case and your bank gave and delivered a bond for it, did they not?

A. I believe so.

Q. So, instead of being turned over to the sheriff, you gave a bond and retained the certificate?

A. Yes.

Q. Do you know of search and inquiry being made for that anywhere since it was present at the last trial?

A. Yes sir.

Q. Do you know whether anybody has been able to find it?

A. I think not, Mr. Osborn.

Q. The Citizens Bank never returned it to Mrs. Opperman?

A. No sir.
Q. And it was never transferred on the books of the First National Bank from Mrs. Opperman's name, either, was it?

The defendant objects to the question for the reason that he cannot have any knowledge of what was done in the office of the First National Bank. And there is better evidence, if it was transferred.
The Court overrules the objection.
The defendant excepts.

A. Not to my knowledge.

135 Cross-examination.

By Charles P. Drummond:

Q. Mr. James Gallaher, who is now judge of the circuit court of La Porte county was your attorney when this case was up before, wasn't he?
A. Yes sir.
Q. And have you had Mr. Gallaher look among his papers to see if he could find this certificate?
A. Yes sir.
Q. It is a fact, isn't it that all the lawyers have tried to find this certificate?
A. That is what Mr. Osborn said.

136 And the defendant, in support of the issues on its behalf, introduced the following evidence, to wit:

C. E. Arnt—Direct Examination.

C. E. ARNT, a witness called on behalf of the defendant, having previously been duly sworn, was examined by C. P. Drummond and testified as follows:

Direct examination.

By C. P. Drummond:

Q. You are the same Mr. Arnt who testified yesterday?
A. Yes sir.
Q. I believe you stated that you were the president of the Citizens Bank of Michigan City?
A. Yes sir.
Q. And you testified that you were acquainted with Mr. Opperman and had known him for a number of years?
A. Yes sir.
Q. On the 19th day of September, 1904—to refresh your recollection—did you see Mr. Henry Opperman that day? (Hands paper to the witness.)
A. Yes sir.

Q. Had he, prior to that time, borrowed some money of your bank?

A. Yes sir.

Q. And on the date of September 19, 1904 you may tell the jury how much he owed you at that time—owed your bank.

A. $3,630.

Q. In what form was the debt represented when the money was first obtained?

A. In the form of notes.

Q. What were the amounts of the notes?

A. There was one note of $500, another of $1,000, another of $1,000, another of $1,000, and one for $129.15 and at the
137 date of September 19, 1904 the note of $500 and the note of $129 had been consolidated, and with the interest that was due on that note that made $630, and which Mr. Opperman agreed to pay.

The plaintiff moves to strike out the last part of the answer of the witness for the reason it is not responsive.

The court directs that the words "and which Mr. Opperman agreed to pay" may go out.

Q. You may tell the jury, Mr. Arnt, whether Mr. Opperman got the money in the amount which you have testified.

A. He did.

Q. Now, the date of September 19, 1904—on that date, you may tell the jury in what notes, and the amount of the notes, this debt was represented to which you have testified.

A. One note of $630—that is on the 19th of September?

Q. Yes.

A. And three notes of $1,000 each.

Q. Now, what, if anything occurred on that day between you and him with respect to a certificate of bank stock? Just tell the jury in your own way what was said by him and what was said by you.

A. On the 19th of September the note for $630 was due.

The plaintiff moves to strike out the answer for the reason it is not responsive to the question.

The court overrules the motion.

138 The plaintiff excepts.

The reporter reads the question.

A. On the 19th day of September, 1904, a note of $630 was due which he agreed to pay at maturity; he came in——

The plaintiff moves to strike out the answer of the witness "which he had agreed to pay at maturity" as being his conclusion.

The court overrules the motion.

The plaintiff excepts.

Q. If you can take up the broken thread go ahead.

A. He came in and stated that he couldn't pay it, but if I would give him an extension of this note and his paper that was coming due

he would give me some collateral; I asked him what the collateral was and he said he had some bank stock, and he pulled a certificate out of his pocket of the First National Bank of Michigan City indorsed in blank.

Q. Was that the certificate of bank stock which is in question here?

A. Yes sir.

Q. Now, what else was said between you and him and what was done?

A. I agreed——

Q. What was said and done?

A. I said I would accept the stock as collateral.

Q. Did you take the certificate of stock and the assignment thereof in your hands and examine them?

A. I did.

Q. Was there any suggestion which you made to him in reference to how it was signed?

139 A. It was indorsed below the regular line on the printed blank at the back.

Q. Right there: where was the word "witness in respect to where that name appeared, if you remember?

A. It was below.

Q. What suggestion, if any, did you make to him then, after you had noticed it?

A. I told him I thought it would be better to have it signed on the regular line designated on the back of the blank assignment.

Q. What did he do, upon that suggestion?

A. He took it and left the bank.

Q. Did he return that same day?

A. Yes sir.

Q. And what, if anything, was the difference between the signature then from what it was before?

The plaintiff objects to the question.

Q. What did the certificate show after he returned?

A. It showed the signature in the place that I designated.

Q. And did he, at that time or at any time, until about the time this suit was commenced, say anything to you whatever about getting that bank stock from his wife?

A. No sir.

Q. You may state whether or not, at that time, you believed that bank stock was owned by him.

A. I did.

Q. Did Mrs. Opperman, the plaintiff here, ever, at any time, make any claim to you or to any officer of your bank which claim came to your knowledge, that she was the owner of this certificate of bank stock until Mr. Osborn, her attorney, came to your bank and demanded it?

140 A. She did not; that was the first time I knew it.

Q. And that was over a year, wasn't it, after the certificate had been accepted by you as you have stated?

The plaintiff objects to the question as being leading.

Q. How long was it, to the best of your memory?
A. Not quite a year.
Q. You may state whether or not, while this bank stock was in your possession, taken in the manner that you say it was, whether you renewed the notes which were in force at the time the certificate was assigned to you.
A. I did renew them.
Q. Could you tell the jury about how many times you renewed them?
A. I think they were renewed every thirty days.
Q. Did Mr. Opperman pay the interest on them?
A. He did.
Q. Did you ever make any complaint in regard to your money until the demand was made by Mr. Osborn that this certificate belonged to his wife?
A. Never did.

Defendant's Exhibit A and Defendant's Exhibit B marked for identification by the reporter.

Q. You may look at the notes which I now present to you and for the purpose of identification marked "Defendant's Exhibit A" and "Defendant's Exhibit B," and tell the jury whether or not those two notes represent the debt which was in existence at the time you accepted that certificate of bank stock.
A. These notes represent the amount of the debt.
Q. Have those notes been paid, Mr. Arnt?
141 A. They have not.
Q. I notice that these notes read "to C. E. Arnt, Cashier": was that the custom you adopted in your bank instead of putting in the name of the bank?
A. Yes sir.
Q. Whose notes are these?
A. Notes of the Citizens Bank of Michigan City, Indiana.
Q. And whose notes were all the others that were given?
A. Notes of the Citizens Bank.

Defendant's Exhibit A Offered and Read in Evidence.

The defendant offers in evidence the note marked "Defendant's Exhibit A," and reads the same in evidence as follows:

"Citizens Bank.

$1,630.00. Michigan City, Ind., Mar. 29, 1905.

Thirty Days after date we jointly and severally promise to Pay to the order of C. E. Arnt, Cas. Sixteen hundred & thirty Dollars With interest at the rate of eight per cent per annum, from Maturity until paid, and Attorney's fees, negotiable and payable at the Citizens

Bank, of Michigan City, Indiana, value received, without any relief whatever from Valuation or Appraisement Laws.

The Drawers and Endorsers severally waive presentment for payment, Protest and notice of Protest, and non-payment of this Note.

H. A. F. OPPERMAN.

No. 42787.
Due April 28."

Defendant's Exhibit B Offered and Read in Evidence.

The defendant now offers in evidence the note marked "Defendant's Exhibit B" and the same is read in evidence as follows:

142 "Citizens Bank.

$2,000.00. Michigan City, Ind., April 7, 1905.

Thirty Days after date we jointly and severally promise to Pay to the order of C. E. Arnt, Cas. Two thousand Dollars with interest at the rate of eight per cent per annum, from Maturity until paid, and Attorney's fees, negotiable and payable at the Citizens Bank, of Michigan City, Indiana, value received, without any relief whatever from Valuation or Appraisement Laws.

The Drawers and Endorsers severally waive presentment for payment, Protest and notice of Protest, and non-payment of this Note.

H. A. F. OPPERMAN.

No. 42964.
Due May 17, 190–."

Q. At the time, Mr. Arnt, that you accepted this certificate was Mrs. Opperman present?

A. She was not.

Q. Did she ever, at any time, before that date or since—I mean up to the time that the demand was made, and including that time—ever say anything to you about owning this bank stock?

A. She never has.

Cross-examination.

By Frank Osborn:

Q. Mr. Arnt, this money that Mr. Opperman borrowed from your bank was all borrowed by him sometime previous to September 19, 1904, wasn't it?

A. Yes sir.

143 Q. When do you say was the last money he borrowed?

A. I am not positive without referring to my notes, but I think in July.

Q. That was the time he borrowed $129.15 was it?

A. Yes sir.

Q. That was the amount which was added to the $500 note, so as to ma-e a note of $630, was it?
A. Yes sir.
Q. When was the $630 note first made?
A. August 25.
Q. August 25, 1904?.
A. 1904.
Q. And for how long a time was that note of August 25, 1904, for $630 drawn the first time?
A. It was made payable on the 19th day of September, at Mr. Opperman's request.
Q. I didn't ask you anything, Mr. Arnt, about Mr. Opperman's request.
A. It was an unusual time: that is the reason I explained it.
Q. I was asking you when it was made payable: how was the note written?
A. After September 19, 1904.
Q. After September 19, 1904?
A. On or before—something like that.
Q. Which was it?
A. My recollection was September 19, 1904; that is what my record says; I just testified from my record.
Q. You have said after September 19, 1904, and you have also said on or before September 19, 1904—which is it?
A. The fact was the note was due on the 19th.
Q. How was that note written as to when it should be paid?
A. September 19, 1904.
144 Q. You have got three expressions there: you have stated that it was after September 19, 1904; you have also stated it was on or before September 19, 1904; and now you state it was September 19, 1904—it wasn't all three of those, was it?
A. No sir.
Q. Which of the three was it?
A. It was due September 19, 1904.
Q. Did the note so read? Were those words in it: "Due September 19, 1904"?
A. No.
Q. What were the words that expressed its maturity?
A. Just give me the note and I will read it.

(Mr. Drummond hands witness a paper.)

Q. Have you now in your hand the note of $630 we are talking about?
A. A copy of it.
Q. Let us see the copy of the note, will you?

(The witness hands counsel the note.)

Q. This paper which counsel has just handed you and which you say is a copy of that note—when did you make that copy?
A. I don't remember.
Q. Well, where is the original note?

A. The original note is cancelled and no doubt in the possession of Mr. Opperman.

Q. How long since you have seen that original note?

A. Not since it was paid.

Q. Do you mean since the time it was paid or since the time it was renewed?

A. Since the time it was renewed.

Q. When was that note renewed the first time after it was given?

A. Do you mean on the 19th of September?

Q. If you don't understand, say so, and I will try to make
145 it plain.

The reporter reads the question.

A. The $630 note?

Q. Yes.

A. It was renewed on the 19th day of September, 1904.

Q. And on the 19th of September, 1904, is the time when you gave the original to Mr. Opperman, is it?

A. Yes sir.

Q. And you haven't seen it since?

A. No sir.

Q. Now, you have produced here what purports to be a copy of that note—did you make this paper which purports to be a copy of it from that note?

A. I made it from the record; I have the record here in court.

Q. That is to say, you undertook to make up a copy of that note.

A. I made a copy of the note from the record.

Q. You didn't make a copy of the note, then, did you? You simply took a blank and referred to the record you had kept and made the copy?

A. Yes.

Q. When did you actually write into this note the writing that appears in it now?

A. I don't remember.

Q. Well, was it within the year?

A. No, I think it was on the former trial.

Q. The former trial was how many years after you had last seen the note?

A. Oh I suppose five years.

Q. Five years after you had last seen the note?

A. Yes.

Q. Now, have you copies of any of these other notes made
146 in the same way, Mr. Arnt?

A. I don't know; my counsel may have.

Q. You don't know anything about them?

A. No.

Q. Now, Mr. Arnt, as a matter of fact, haven't you all of the original notes that were renewed from time to time?

A. No sir.

Q. Mr. Opperman failed in business some time in the spring of 1905, did he not?

A. Yes sir.
Q. Made an assignment for the benefit of his creditors?
A. Yes sir.
Q. Turned his property over to them?
A. Yes sir.
Q. And you filed, in connection with his assignment, your claim based on these notes which were renewals of the old notes, in order to get your share of his property, didn't you?
A. Yes sir.
Q. And your bank received its proportion of the proceeds of Mr. Opperman's property that was sold in connection with his assignment, did you not?
A. No sir.
Q. Who was the assignee?
A. The Michigan City Trust Company.
Q. What per cent did that assignee pay you?
A. I don't remember.
Q. You don't remember; did you file your claims with him?
A. We did.
Q. Did you receive any money on those claims?
A. We did.
Q. How much did you receive?
A. I don't remember; part of it was held up for this trial; retained by the Trust Company to this day.
Q. What is your recollection as to the amount which you
147 received so far?
A. I couldn't state.
Q. You have no recollection whatever on the subject?
A. No.
Q. You have known it at some time, haven't you?
A. Certainly; it came in the regular course of business.
Q. Is your recollection pretty good?
A. I am only a man.
Q. A great many matters occur in the regular course of business that pass from your mind?
A. Yes sir.
Q. That you wouldn't pretend to recollect—is that right?
A. Yes sir.
Q. Now, this money that Mr. Opperman borrowed of you was used by him in connection with his mercantile business, was it not?
A. I think so.
Q. You knew that at the time?
A. Yes sir.
Q. You knew, at the time he borrowed the money, it was for that purpose, didn't you?
A. Yes.
Q. And you kind of kept tab, in a certain way, as to what he did with that money?
A. No; I had confidence in Mr. Opperman.
Q. You didn't notice, particularly, that it was used in the business?

A. I supposed it was.

Q. And when the indebtedness crept up to the amount that it finally did you began to watch it a little closer than you did at first, didn't you?

A. I don't think so.

Q. I believe your conditional examination was taken in this case shortly after the case was commenced, was it not?

A. I think so.

Q. At the time your conditional examination was taken you stated, did you not, that Mr. Opperman had got up to about
148 the limit and that you so told him?

A. Yes sir.

Q. You told him that some little time before September 19th, didn't you?

A. I may have.

Q. You told him that at the time he borrowed the last thousand, didn't you?

A. I may have.

Q. And can you give us about the date when he borrowed the last thousand?

A. I can't.

Q. Approximately the date—how long before September 19th?

A. It might have been 60 days.

Q. Now, the $129.15 was borrowed, you say, on August 25?

A. No, before that.

Q. How long before that?

A. I think in July; if I remember.

Q. Then, the last thousand was borrowed even before that, was it not?

A. Yes sir.

Q. About how long before July would you say the last thousand was borrowed?

A. I don't know; might have been 30 days.

Q. You heard Mr. Opperman's testimony as to the dates on which these various amounts were borrowed, did you not?

A. Yes sir.

Q. And would you say, as nearly as you can remember, that those dates were substantially correct?

A. Yes sir; I don't doubt his word.

Q. So that, at some time, at least as early as June, then, you had had a talk with Mr. Opperman in which you told him he was getting up to about the limit of what you could loan him?

A. Yes sir.

Q. Now, do you remember, at the time you had that talk,
149 what else was said about that loan and the limit?

A. Why, no.

Q. Do you remember anything that was said between you at that time?

A. We agreed to reduce it.

Q. Do you remember anything that was said between you at that time?

A. If I spoke to him about it——

Q. I am not asking you to argue it. Do you have any recollection of the conversation that occurred between you at that time—what was said?

A. Not at this time.

Q. And at the time he borrowed $125 in July, 1904, have you now any recollection of the conversation that occurred between you at that time?

A. No sir.

Q. Is you- recollection of what occurred on September 19, 1904 and prior to that time any better now than it was at the time your conditional examination was taken in this case?

A. Since that examination I have refreshed my memory in order to testify to the facts in the case.

Q. Yes; that is to say, you have been thinking the thing over and working it out in your own mind so as to see if you can testify to something more then you did at that time—is that it?

A. I examined my record to get the facts; I am testifying now from my conclusions from examining the records.

Q. Conclusions from what you discovered on the record.

A. The records refreshed my memory.

Q. What did you have on your records that refreshed your memory?

A. For instance, on the 19th of September, my records
150 show I made a note on that day, and by going back I see the maturities on that day.

Q. Anything else on your record?

A. No.

Q. You had no record of what was said between you and Mr. Opperman, did you?

A. No sir.

Q. That you could refer to to refresh your recollection?

A. No sir.

Q. You had nothing on your record as to what Mr. Opperman did on that day, did you, except the making of a note?

A. The making of the notes and signing the collateral agreement.

Q. You didn't testify on that conditional examination and say: "Mr. Opperman pulled that certificate of stock out of his pocket when he came in the bank," did you?

The defendant objects to the question on the ground that the witness is entitled to have the questions read to him that he may hear them; that is entirely unfair to the witness. If he has any written statement of the witness made at any time prior to his testifying here the rule is that he should read the written statement, if it is a written statement, or questions, to the witness, that he may know what he is answering.

The court overrules the objection.

The defendant excepts.

A. I testified to the best of my recollection then and now.

151 Q. That examination was taken in the year 1906, was it not?

A. I don't remember.

Q. I will show you this conditional examination to refresh your recollection now as to the time when that was taken. (Hands paper to witness.) After looking at the paper which I handed you and which I term your conditional examination, can you now state when that examination was taken?

A. According to that paper it was August, 1905.

Q. 9th day of August, 1905: that was less than a year after you had taken this certificate of deposit from Mr. Opperman, wasn't it?

A. Yes sir.

Q. Referring to this paper, which I will have marked for identification by the stenographer "Plaintiff's Exhibit No. 5" I ask you to look at the signature at the end of that statement and state whether or not that is your signature.

A. It is.

Q. You took an oath at the time that statement was made to testify to the truth, the whole truth, and nothing but the truth in relation to that matter, did you not?

A. I did.

Q. And your testimony was taken down at that time in shorthand and written out by Miss McKeon, the stenographer?

A. Yes sir.

Q. You afterwards read it over and signed it, did you not?

A. I did.

Q. At the time when Mr. Opperman brought that certificate of stock in and you called his attention to the fact that his wife had signed it in the wrong place, and after he had taken it back to his wife and brought it back again, was anybody present beside

152 yourself and Mr. Opperman at either of those interviews?

A. I think my help was in the bank.

Q. Do you remember anybody now that was in the bank and present?

A. Mr. Wilson and Mr. Weiler were in the bank at the time.

Q. Were they up there where you and Mr. Opperman were talking?

A. I couldn't say now.

Q. On August 9th, 1905, at the time of the taking of your conditional examination in this case was this question asked you and did you make this answer: "Q. Who, if anyone, was present at the time Mr. Opperman gave you this certificate of stock No. 385? A. No sir, just Mr. Opperman and myself. Q. Anybody else? A. No sir." Were those questions asked and did you make those answers?

A. I did.

Q. Now, had you asked Mr. Opperman for any security for what he was owing the bank prior to September 19, 1904?

A. I think so.

Q. You think so?

A. I think so.

Q. When did you first ask him for security?
A. I don't remember.
Q. Well, about how long before September 19th?
A. Might have been thirty days; maybe longer.
Q. Might have been six months?
A. No, I hardly think so.
Q. You think it may have been thirty days?
A. Might have been sixty.

Q. Where were you when you talked with him and asked
153 him for security?

A. In my judgment in my office.

Q. Have you any recollection of that or are you just saying that because you think probably you did?
A. I think I probably did.
Q. You have no recollection on the subject—is that it?
A. I can't positively identify the spot.
Q. Can you remember the language that you used?
A. I can't.
Q. Do you remember what Mr. Opperman said to you in reply when you told *he* you wanted security.
A. I don't remember now.
Q. But you now think you had asked him for security prior to September 19th?
A. Yes.
Q. On your conditional examination were these questions asked you and did you make this answer: "Q. Had you asked for that certificate or any other or additional security? A. No."?

The defendant objects to the question for the reason the question asked does not refer to the same question asked the witness and therefore is not fit for any purpose—impeachment or anything else.

The defendant further objects on the ground that the document read from is not a conditional examination but the mere deposition of the witness taken as a witness and not as a party; that its only use at this time—the only use that can be made of it—is for purposes of impeachment and the question asked the witness on the stand
154 is upon a different state of facts than the one read by Mr. Osborn: in other words, that the one read by him does not tend to contradict or impeach the statement he has just previously made.

The court overrules the objection.

The defendant excepts.

A. I asked him to pay the loan.

The reporter reads the question.

Q. Was that question asked and did you make that answer on your conditional examination?
A. I did.
Q. And was this question asked and did you make this answer: Q. When did you ask him to pay the loan? A. I either asked him

to pay the loan or when he made the loan it was to be paid at maturity, and in the meantime he brought in that certificate." Was that question asked and did you make that answer?

A. I did.

Q. No, Mr. Arnt, I believe you said on this trail that this note of $1,530 matured on September 19, 1904—is that correct?

A. I said the note of $630 matured on that date.

Q. That was the note that you had under consideration, was it, when Mr. Opperman brought in this certificate of stock?

A. Yes sir, that is my recollection.

Q. That is your recollection?

A. Yes sir.

Q. Now, at that time, you also held some other notes for $1,000 each: when were those notes due at that time?

155 A. My recollection is one was due on the 2nd of October, one was due on the 8th of October and one on the 11th of October.

Q. Now, having in mind the statement that you now make to the effect that the $630 note came due September 19th, I want to call your attention to these questions and answers following the last question and answer I asked you: "Q. Now, you say that when you make the loan it was to be paid at maturity—which loan do you refer to? A. Well, I am of the impression that this $1,630 loan." Were you asked that question and did you make that answer?

A. I did, but I found I was mistaken; I searched my records and found that was not the loan; searched the records to find the truth; I brought the records with me if the counsel wishes to examine them.

Q. You are testifying, then, as to your conclusions from your records and not from your recollection, are you?

A. My recollection and the records.

Q. You are testifying both from your recollection and your records?

A. Yes.

Q. And now you say that that was a mistake. Now, was this question asked you and did you make this answer: "Q. And for how long was that loan made? A. I couldn't say. Q. Had it matured at the time this certificate of stock was brought in? A. I think not." Were you asked those questions and did you make those answers?

A. Yes sir, but I find now that I was mistaken; I have looked up my records.

Q. And then was this question asked and did you make this answer, in that same connection: "Q. Then, had you asked Mr. Opperman for any security of any kind at the time he

156 brought this certificate to you? A. No." Were you asked that question and did you make that answer?

A. Yes sir.

Q. Is that correct or isn't it?

A. I couldn't say at this time.

Q. You don't know?

A. I don't remember; my impression is I did ask him for security.

Q. "Q. Do you mean to say that he voluntarily brought this certificate to you? A. He did." Was that question asked and did you make that answer?

A. I did.

Q. Is that correct?

A. My remembrance of it is, he did bring the certificate in and pulled it out of his pocket.

Q. The question is "he voluntarily brought it." Did he or did he not?

A. I didn't force him to bring it in.

Q. I am asking you now: what is the fact—had you asked him for security prior to September 19th or had you not?

A. My impression is I had; I might be mistaken, but that is my impression.

Q. Was there any money paid Mr. Opperman by your bank at the time he brought in and left this certificate with you?

A. No sir.

Q. Now, I believe you say that when Mr. Opperman—you now say that when Mr. Opperman brought this certificate into the bank to you—give us the words as nearly as you can that he used.

A. I can't do that; I don't remember.

Q. Can you remember a single word that he used in that conversation?

157 A. He said he had some bank stock to put up as collateral; that is my best recollection.

Q. Did he say anything at that time about whose bank stock that was?

A. No sir.

Q. Then you don't mean to say to this jury that Mr. Opperman at that time told you that this was his bank stock, do you?

A. The presumption is——

Q. What is the fact?

A. The fact is that when a customer presents bank stock for collateral we consider it as his.

The reporter reads the quetsion.

A. That is my impression.

Q. Do you want the jury to understand that you are now swearing that Mr. Opperman at that time said to you that the bank stock which he brought in was his bank stock?

The defendant objects to the question on the ground that the witness has answered it twice; he said that was his impression and he answered a moment ago that Mr. Opperman said he had some bank stock.

The court overrules the objection.

The defendant excepts.

A. I don't remember just what he did say.

Q. On your conditional examination was this question asked and did you make this answer, referring to Mr. Opperman: "Q. What

did he say to you about this certificate of stock and his loans when he brought this certificate to you at the bank? A. He brought
158 the certificate and he said he would pledge that as security for the money owing the bank. Q. And what else did he say? A. That was all." Were those questions asked you and did you make those answers on your conditional examination?

A. I did.

Q. And were they correct?

A. My impression was at that time that they were.

Q. "Q. Did he say anything as to where he got that certificate? A. No sir." Was that question asked and did you make that answer?

The defendant objects to the question as not being impeachment.

The court overrules the objection.

The defendant excepts.

A. Yes.

Q. Was that correct?

A. I think so.

Q. Now then, Mr. Arnt, at the time when Mr. Opperman presented that certificate of stock to you and you looked at it and read it over, did you not—you looked at it, did you not?

A. I looked at it.

Q. You read it, did you not?

A. Yes sir.

Q. You saw at that time the certificate was made out to Mary Opperman, did you not?

A. I did.

Q. You knew at that time that Mary Opperman was the wife of Henry Opperman, didn't you?

A. I knew his wife.

Q. You knew it was his wife?

A. Yes.

Q. You knew at that time that the money which had been borrowed of your bank by Mr. Opperman, and which you were
159 taking that certificate of stock as collateral for, was Mr. Opperman's debt and not Mrs. Opperman's debt?

A. Yes sir.

Q. And when you saw that certificate of stock was made out to and in her name you noticed it had only been issued to her a little over a month before, didn't you?

A. I don't remember as I noticed the date of its issue.

Q. The date of that certificate is August 20, 1904, is it not?

A. I believe so; it has been so testified here, but I don't remember.

Q. Just a month, lacking a day, before the time it was brought into your bank. You knew at that time that Mr. Opperman was hard up, didn't you, and had been for some time?

A. No; he wasn't hard up, I don't think; he borrowed money of us.

Q. You knew he had borrowed money at your bank?

A. Yes sir.

Q. And that he used it in his business up to the limit of his credit with your bank, didn't you?

A. Yes sir.

Q. He told you he was a little hard up at that time, didn't he?

A. I don't remember; he may have.

Q. You knew at that time that he didn't have any money to be buying bank stock within thirty days of this time, didn't you?

A. I didn't know his financial condition.

Q. You didn't know his financial condition, and yet you were pressing him for payment and security on the money that he had borrowed from your bank, and yet you say you didn't know
160 his financial condition—is that right?

A. Yes sir; we didn't have any certain limit; some of our directors thought we ought to have the loan reduced or secured.

Q. You thought so yourself, didn't you?

A. We always feel a little better when the loan is secured.

Q. You thought so yourself didn't you?

A. Yes sir.

Q. And when that stock was brought in there to you running to Mary Opperman you didn't take the precaution or trouble to ask any questions about it as to how he came to have it?

A. No sir; that was his business, not mine.

Q. You think that was his business and not yours. You knew at that time that Mrs. Opperman was living within two blocks of your bank, didn't you?

A. Yes sir—three blocks.

Q. You were personally acquainted with her?

A. I knew that she was Mrs. Opperman when I saw her on the street.

Q. There wasn't any question about your acquaintance with her, was there?

A. I knew it was her.

Q. There isn't anything in your knowledge of her or acquaintance with her that would prevent you from asking her about this stock?

A. I could have gone to the house.

Q. You have a telephone?

A. Yes.

Q. You didn't make any effort to find out whether she had a telephone or not, did you?

A. I didn't.

Q. And you make no effort whatever to get into communication with Mrs. Opperman or find out in any manner what the
161 facts were in regard to that certificate, did you?

A. I did not.

Q. You knew also, when the certificate of stock was presented to you that it had not been transferred from Mary Opperman on the books of the First National Bank, didn't you?

A. We took stock indorsed that way every day.

Q. I am not asking you what you took, Mr. Arnt.
A. I just wanted to make it clear, that is all.

The reporter reads the question.

A. Yes sir.
Q. How far was the First National Bank, at that time, from your bank?
A. About half a block; across the street.
Q. You were well acquainted with the officers of the First National Bank, were you not?
A. Yes sir.
Q. You didn't make any inquiry of the First National Bank or of any of its officers as to the ownership of that stock, did you?
A. I didn't; it is not customary.

The plaintiff moves the court that the statement "not customary" be stricken out.
The court sustains the motion.

The Witness: I didn't want the other bank to know what was going on.
Q. I believe you dropped the remark, Mr. Arnt, that you didn't want the First National Bank to know what you were doing. Did you make that statement a moment ago, or the substance of it?
A. It is not customary for one bank to advertise its business to another bank.
Q. You didn't care to have the First National Bank know
162 that you were taking that stock, did you?
—. ——.
A. As a matter of fact, Mr. Arnt, at the time you took this certificate of stock from Mr. Opperman you didn't want anybody outside of yourself and those connected with your bank and Mr. Opperman to know about it, did you?
A. That wasn't the idea; we don't advertise any business of your clients.
Q. What did you do with that certificate, Mr. Arnt, immediately after you got it?
A. Placed it with our collaterals.
Q. Where?
A. In the safe.
Q. In the bank?
A. Yes.
Q. How long did you keep it there?
A. Until you demanded it.
Q. It was there in the bank on the day I demanded it, wasn't it?
A. It was.
Q. And a few days after that you turned it over to Mr. Gallaher?
A. I did.
Q. That certificate was in the possession of your bank from September 19, 1904 until after this suit was commenced, some time in July, 1905, is that right?
A. Yes sir.

Q. You knew that the First National Bank declared its dividends twice a year, didn't you?
A. That was my impression.
Q. You knew that to be a fact, didn't you?
A. I have heard it said they did.
Q. As a matter of business, you know it, don't you?
A. It was current report they did.
Q. You knew it at that time?
A. I understood it.

Q. You had this certificate of stock in the safe of your
163 bank in January, 1905, didn't you?

A. Yes sir.

Q. You didn't present that certificate to the First National Bank or demand the payment of that dividend to your bank, did you?

(No Answer.)

Whereupon court adjourned for the day.

9:30 o'Clock in the Morning.

January 16, 1913.

Trial resumed.

C. E. ARNT recalled to the stand for further cross examination.

Q. Mr. Arnt, at the time your examination was taken in this case in August, 1905, was this question asked you and did you make this answer: "Q. Did you make any inquiry of Mr. Opperman at the time he presented this certificate to you as to how it came into his possession? A. No sir." Was that question asked and did you make that answer?
A. Yes sir.
Q. And then were you asked this question and did you make the answer: "Q. Did he make any statement to you as to who it belonged to? A. He didn't." Were you asked that question and did you make that answer?
A. Yes sir.
Q. Now, I believe you say that when that certificate was first examined by you you looked it over and found that the signature of Mrs. Opperman wasn't in the proper place—is that right?

A. I found the signature of Mary Opperman was not in
164 the proper place.

Q. It was signed where?
A. I should say about half way down the back.
Q. Not on any line; not on the line which had been prepared in the blank for it?
A. No sir.
Q. About how far below that line was it signed?
A. I think about an inch; possibly a little more.
Q. And with what kind of an instrument had that been signed—pen and ink or indelible pencil.

Q. I think it was indelible pencil.
Q. And when you noticed that condition you called Mr. Opperman's attention to it, did you not.
A. I requested the signature be placed in the proper place.
Q. You called Mr. Opperman's attention to the fact that the signature wasn't in the proper place, didn't you?
A. Yes sir.
Q. And then you made a mark on the back of that certificate to indicate where she should sign her name, didn't you?
A. I made a mark to indicate where the signature should be.
Q. And that mark you made there in the presence of Mr. Opperman and requested him to have his wife sign it at that place?
A. No.
Q. You requested him to return and have his wife resign it, didn't you? Did you or did you not??
A. I didn't make that statement to have his wife sign it.
Q. What did you put that mark on the back of it for?
165 A. To have the signature of the person who owned the stock signed in the proper place.

Mr. Osborn: Read that answer.

The reporter reads the answer.

Mr. Collins: Give us your further answer.
Mr. Osborn: I submit he has answered the question.
The Witness: I wanted the signature in the proper place, that was all.

Mr. Osborn:

Q. Now, then, did you tell Mr. Opperman, when you made that mark—that cross, there—who you wanted to sign at that place?
A. I wanted the transfer correct.

The reporter reads the question.

A. I said that the signature of Mary Opperman should be in the proper place—in the place indicated.
Q. Then, you did tell him who you wanted to sign at that place, didn't you?

The defendant objects to the question for the reason the witness has already answered it.
The court overrules the objection.
The defendant excepts.

A. I told him I wanted the signature in the proper place, and I designated where I wanted it.
Q. Then, after you had made the mark on the back of that certificate, what did you do with it immediately after you had made the mark on it?
A. Handed it to Mr. Opperman.
166 Q. And when you handed it to Mr. Opperman what did he say?

A. I don't remember.
Q. And when you handed it to Mr. Opperman what did you say?
A. I don't remember of saying anything excepting what I have stated.
Q. And immediately after you handed it to him then what did he do?
A. Left the banking room.
Q. Did you know at that time where he was going?
A. I didn't.
Q. Did you have any idea in your own mind where he was going?
A. No.
Q. How long after Mr. Opperman left the bank before you saw him again?
A. I don't remember the lapse of time.
Q. About how long?
A. I am sure he returned the same day.
Q. And do you know where he had been while he was away?
A. No sir.
Q. When he came back did you ask him where he had been?
A. No sir.
Q. Did he tell you where he had been?
A. No sir.
Q. When he came back did he have that certificate with him?
A. He did.
Q. And did he show it to you?
A. He handed it to me.
Q. Did you look at it?
A. I did.
Q. Look at the back of it?
A. I did.
Q. Was there anything on the back of it when it was brought back that wasn't there when it was taken away?
A. The signature was in the proper place.
167 Q. Whose signature?
A. The signature of Mary Opperman.
Q. It was written then on the line—on the dotted line—and just opposite the mark you had made before Mr. Opperman took it away?
A. It was.
Q. Was that signature with pen and ink or pencil?
A. My recollection is that it was with pen and ink.
Q. You told him, did you not, when he took the paper away, that he should have it signed in pen and ink?
A. I don't remember.
Q. I believe you said on yesterday that when the certificate was presented to you you looked it over and read it?
A. I did.
Q. And you noticed then, when you read it, that it contained the clause: "Transferable only on the books of the bank in person or by attorney on the surrender of this certificate," didn't you?
A. All bank stock has that indorsement.

Mr. Osborn: I move to strike out the answer and ask that the question be answered.

The Court: That can be answered by yes or no.

The defendant objects to the question on the ground that the witness has stated that he read what was written on the certificate and if he did that he read all there was there.

The court overrules the objection.

The defendant excepts.

A. I read the indorsement on the back and found it was in
168 the usual form.

The plaintiff moves the court to strike out the answer of the witness as not being responsive to the question.

The court sustains the motion.

The reporter reads the question.

A. I saw that the transfer was proper and in the usual form.

The plaintiff moves the court to strike out the answer of the witness as not being responsive to the question.

The court sustains the motion.

The reporter reads the question.

A. I did; it was in regular form.

The plaintiff moves the court to strike out all of the answer of the witness except "I did" on the ground that it is not responsive to the question asked.

The court sustains the motion.

Q. If I understand you, then, you, immediately after *re-* receiving this certificate after it had been signed by Mrs. Opperman at the place you had indicated, put it among your files?

A. In with my collateral.

Q. And you had no further conversation with Mr. Opperman about it at that time?

A. No sir.

169 Q. On your examination in August, 1905, was this question asked and did you make this answer: "Q. Was this indebtedness of $3,600.30 or any part of it due or past due on September 19, 1904? A. I think not."—was that question asked you and did you make that answer, on your conditional examination?

The defendant objects to the question on the ground that it does not tend to impeach anything that the witness has said; that he said substantially that on his examination yesterday, and that the constant repetition and insinuation made by counsel in the introduction of this deposition can only serve—can only become prejudicial to this defendant.

The court overrules the objection.

The defendant excepts.

A. I testified then from memory; since then I have examined the records and find that there was a note due on that date.

The plaintiff moves the court to strike out the answer of the witness as not being responsive to the question.

The court overrules the motion.

The plaintiff excepts.

Q. Was this question asked you and did you make this answer on that examination, immediately following the one I have just
170 asked: "Q. Had you at any time prior to September 19, 1904, suggested to Mr. Opperman that he furnish you any other or additional security for the indebtedness which the bank held? A. I had suggested to him that he pay part of his loan." Was that question asked and did you make that answer on your conditional examination?

The defendant objects to the question upon the ground that the document read from is a deposition taken—is the witness' deposition taken since this trial was brought; that he is not a party to this action; that the question asked can only be used for the purpose of impeachment, as there has been no offer to introduce the deposition as a whole and the witness is present in court, and therefore the only purpose of the question is impeachment; and that it does not tend to impeach any statement that the witness has said; on the other hand, it tends to support what he said on his answer to counsel on yesterday.

The court overrules the objection.

The defendant excepts.

A. I testified then from memory.

Q. Just answer the question whether you made that statement—yes or no.

A. I did.

Q. And then was this question asked and did you make this answer: "Now, how long before September 19th was it that you made that statement to him? A. Well, I think only a few days—
171 possibly a week." Was that question asked you and did you make that answer?

The defendant objects to the question upon the ground that the document read from is the witness' deposition taken since the trial was brought; that he is not a party to this action; that the question asked can only be used for the purpose of impeachment, and that it does not tend to impeach any statement that the witness has made.

The court overrules the objection.

The defendant excepts.

A. I did.

Q. Mr. Arnt, you said on yesterday that when Mr. Drummond showed you some notes which had been given in renewal of this debt, and those notes showed they were made payable to C. E. Arnt, Cashier, you stated that those notes, although they were payable to you, in your name, as cashier there, they were notes of the bank.

A. Yes sir.

Q. You never had any personal interest in those notes beyond your interest in the bank as stockholder of that bank, did you?

A. No sir.

Q. And have not now?

A. No sir.

Q. You have taken considerable interest in this case, have you not?

A. That is my duty.

Q. You have, as a matter of fact, haven't you?

A. Yes sir.

Q. Do you remember about the time this case came back
172 from the supreme court?

A. Yes sir.

Q. There was a conference about that time or some time after that between you and your board of directors in regard to this transaction—this certificate of stock—was there not?

The defendant objects to the question for the reason it is not material in this case and can only tend to arouse suspicion and prejudice the rights of the defendant.

The court overrules the objection.

The defendant excepts.

A. After the case came back from the supreme court?

Q. Yes sir.

A. I talked it over with my directors informally.

Q. And in that conference the board of directors, and particularly a Mr. Pitch, said to you in substance that this stock should be surrendered and the litigation stopped, didn't he? And you said in reply to that that you didn't care what the board of directors thought; if they didn't want to continue the litigation you would, at your expense, before you would ever stop it?

The defendant objects to the question on the ground that communications between boards of directors of a bank and the conduct of their affairs are privileged; for the reason, second, that business men have a right to confer together and discuss their business affairs; the law encourages such discussion if made in good
173 faith; and that such discussion cannot be brought into court to determine rights of parties while litigation is pending. For the reason, third: that any statement which Mr. Arnt might have made cannot bind this defendant in any respect. Fourth reason: for the reason that the witness has admitted that he is interested in this case and the facts and circumstances all show that he was the one who transacted the business; that the introduction of such evidence can only serve the purpose of confusing the issues here and prejudicing the rights of this defendant.

The court overrules the objection.

The defendant excepts.

A. Mr. Pitch never requested me to return that stock.

The plaintiff moves the court to strike out the answer of the witness as not being responsive to the question.

The Witness: It is impossible to answer that question yes or no.

Redirect examination.

By Charles P. Drummond:

174 Q. Mr. Arnt, you were asked yesterday if you didn't state in your deposition that there was no one present when this transaction took place, and I believe you said in your answer that there wasn't anyone present; now, I will ask you whether there was anyone present who heard this conversation.

A. Yes.

Q. Now, who was, as a matter of fact, present in the bank that day when that stock was delivered to you?

The plaintiff objects to the question for the reason that he has already stated that there was nobody there near enough to hear or that could hear what was going on; now as to who was present there is wholly immaterial.

The court overrules the objection.

The plaintiff excepts.

A. Mr. Wilson, Mr. Weiler and Mr. Baker; all those three men besides myself.

Q. And how close were they to where you and Mr. Opperman transacted this business, if you remember.

A. The- couldn't have been more than six or eight feet.

Q. How long have those men been in your employment?

A. Mr. Wilson twenty-four year-.

Q. How long had Mr. Weiler been there?

A. Twenty years.

Q. And Mr. Baker?

A. Mr. Baker, I think has been with me ten years; about ten years, Mr. Weiler twenty or over and Mr. Wilson, I think, twenty-four or about that.

175 Recross-examination.

By Frank Osborn:

Q. Mr. Arnt, in answer to Mr. Drummond's question as to who was in the bank at the time of this transaction, you say Mr. Weiler, Mr. Wilson and Mr. Baker were there; have you any recollection now as to those gentlemen being there?

A. It is our policy to always have three men on duty besides myself.

The plaintiff moves the court to strike out the answer of the witness as not being responsive to the question.

The court sustains the motion.

A. They *do* doubt were there; it was during banking hours.

The plaintiff moves the court to strike out the answer of the witness as not being responsive to the question.

The court sustains the motion.

A. They were in my employ at that time; my recollection is they were there.

Q. You now have a recollection that they were there—you will say that, will you?

A. It is my judgment that they were there.

Q. Do you remember particularly that Mr. Weiler was in the bank just at that time?

A. It is my judgment he was.

Q. What do you mean?

A. I think he was.

Q. Do you think he was because you now remember it, or
176 because that was his business to be there?

A. The bank is never left with only one person in it; there is always the officers and two or three clerks on duty.

Q. Then the reason you say that Mr. Weiler was there at that time was because it was the practice to have two or three men there all the time, and your conclusion, then, is that Mr. Weiler was there—is that it?

A. I am willing to say that Mr. Weiler was there.

Q. Are you willing to say that you now remember—have a distinct recollection of your own that he was there?

A. It is my judgment Mr. Weiler was there.

Q. Is that the best answer you can make to my question as to your recollection?

The defendant objects to the question, that it is an improper question to ask the witness.

The court overrules the objection.

The defendant excepts.

A. It is my recollection that he was there.

Q. Now, then, Mr. Arnt, in what part of the bank did this transaction with Mr. Opperman take place?

A. I can't now say just what part.

Q. Have you any recollection as to what part of the bank it took place in?

A. Usually at the window.

Q. I am not asking what *is* usually was; have you any recollection now as to what part of the bank that transaction took place?

A. I can't place the exact window.

177 Q. Was it at the window or was it in a private room in the bank?

A. I don't think it was in a private room.

Q. Have you any recollection as to which it was?

A. My judgment is now——

Q. Have you any recollection as to which it was?

A. My recollection is now that it was not in a private room; our rooms are all open.

Q. I didn't ask you that; I asked you if it was your recollection it wasn't in a private room.
A. I cannot now say.
Q. As a matter of fact, Mr. Arnt, you haven't any recollection at the present time on that subject, have you?
A. I am testifying to the best of my knowledge and belief, Mr. Osborn. I am testifying to the best knowledge I now have—recollection.
Q. Have you, at the present time, any recollection upon the subject as to where—in what part of the bank—this transaction took place?
A. It is impossible to fix the place that every transaction occurs in the bank; that is absolutely impossible; I have probably a hundred a day; the transaction took place in the bank—that I know.
Q. The question is, Mr. Arnt, have you, at the present time, any recollection whatever as to in what part of the bank this transaction with Mr. Opperman took place.
A. I can't say at this time in what part it took place.

Mr. Drummond:

Q. How big is the bank rooms there?
A. The enclosure is about ten feet across where we do business and probably twenty feet long.

178 Mr. Drummond:

Q. Are there any partitions in that room that run clear to the wall?
A. They do not.

Mr. Drummond:

Q. How high is the highest partition?
A. I should judge six feet—about that.

Mr. Drummond:

Q. How many men, at that time, were employed by you and on duty as a rule every day?
A. Four men besides myself.

Mr. Osborn:

Q. Mr. Drummond asked you what was the size of your room there—your banking room—and you stated the enclosure was about ten by twenty feet: what was the size of the room itself?
A. Probably twenty-two feet wide.
Q. How long?
A. I should judge, what is used for the banking part, probably sixty feet.
Q. As a matter of fact the rooms that are used there in connection with the bank run back to the back end of the building, do they not?
A. The- do not.

Q. What is in the back end of the building?
A. The toilets and wardrobes; they are back there.
Q. There is a little private room up in the front that is partitioned off that I remember—partition that runs up about eight feet high?
A. Built of glass.
Q. About eight feet high?
A. Six or eight.
Q. That is used as a private room by yourself, is it not?
A. It was then used by Mr. Hutchinson who was then president of the bank; that was his private room; it was very rarely used by myself.

And this was all the evidence given in said cause.

179 *Plaintiff Offers Testimony of Walter Vail on Former Trial of This Cause.*

Mr. Osborn: We now offer to read in evidence the testimony of Walter Vail given upon the former trial of this case. I suppose we might state to the court that this is the testimony of Walter Vail given on the former trial. Walter Vail is now dead.

Testimony of Walter Vail on Former Trial of This Cause Read in Evidence.

Thereupon the testimony of Walter Vail, given on the former trial of this case is read in evidence as follows:

"WALTER VAIL, being duly sworn, testified as follows:

Direct examination.

By F. E. Osborn:

Q. You may state your full name, Mr. Vail.
A. Walter Vail.
Q. Where do you reside?
A. Michigan City, Indiana.
Q. How long have you resided there?
179½ A. Thirty-three years.
Q. What is your business?
A. Banker.
Q. With what bank are you connected?
A. With the First National Bank of Michigan City, and the Michigan City Trust & Savings Company.
Q. And for how long have you been connected with the First National Bank of Michigan City?
A. Thirty-three years next April.
Q. What is your age?
A. Sixty years old.
Q. What official position do you hold with the First National Bank of Michigan City?

A. President.
Q. For how long have you occupied that position?
A. I can't answer that question. I think somewhere in the vicinity of twelve to fourteen years.
Q. Are you acquainted with the plaintiff in this case, Mary Opperman?
A. Yes sir.
Q. How long have you known her?
A. For over twenty years.
Q. I will ask you to look at the paper which I will now hand you, marked "Exhibit 1," purporting to be Certificate Number Three Hundred and eighty-five, of the Capital Stock of the First National Bank of Michigan City, and state whether or not that is your signature to that certificate, as president.
A. Yes sir.
Q. What is that paper?

Objected to by counsel for defendant, on the ground that paper shows for itself.

Q. Did you ever see that paper before today?
A. Yes sir.
Q. By what institution was that paper issued, if you know?
180 A. First National Bank of Michigan City, Indiana.
Q. To whom was it issued?
A. Mary Opperman.
Q. Do you know anything about how that certificate came to be issued to her?
A. Yes sir.
Q. You may state to the jury.

Objected to by counsel for defendant, on the ground that it is immaterial how it came to be issued to her.
Objection overruled.
Exception reserved by defendant.

A. It was issued to her in the distribution of the estate of Mrs. John Krueger—I think her name on the books was Wilhelmina Krueger—brought in by Mr. Rudolph Krueger, who was the administrator or executor, I think, of the estate. And the distribution was made among the heirs of this stock that was in her name in the bank; was parceled out to the different heirs, and issued, according to his instructions; this being one of the certificates in the distribution.
Q. I will ask you whether or not that stock has ever been transferred on the books of your bank from Mrs. Opperman to any other person?

Objected to by counsel for defendant, for the reason that there is better evidence; the books will show whether it has been transferred *to* not. And the further objection that it is not material whether it has been transferred or not; a transfer is not necessary

to pass the title of the stock; and the fact of whether it has
181 been transferred or not is not in issue here in any way.

Mr. Osborn: We offer to show in response to this question that the certificate never has been transferred on the books of the bank to any other person.

Objection sustained.
Exception reserved by plaintiff.

Q. I will ask you, Mr. Vail, whether or not the First National Bank of Michigan City, Indiana, has at any time issued any certificate to any person in place of this certificate 385?

Objected to be counsel for defendant, on the ground that the question as to whether any other certificate has been issued or not does not have any bearing on this issue in replevin.

Mr. Osborn: We offer to show in response to this question that no certificate has ever been issued in lieu or in place of this certificate 385.

Objection sustained.
Exception reserved by plaintiff.

Q. Now, Mr. Vail, I will ask you whether or not this certificate No. 385 has ever been presented to your bank by any one for transfer?

Objected to by counsel for defendant, on the ground that the transfer on the books of the bank is not material to the issue.

Mr. Osborn: We propose to show in response to this question that the defendant has not at any time since it came into possession of this
stock, presented it to the bank for transfer, or done anything
182 with it whatever in an effort to get it into its own name.
Objection sustained.
Exception reserved by plaintiff.

Q. Now, Mr. Vail, are you acquainted with the value of the stock of the First National Bank?
A. Yes sir.
Q. What in your opinion, is the value of the fifteen shares of stock of the First National Bank of Michigan City represented by this certificate No. 385.

Objected to by counsel for defendant, on the ground that this is an action in replevin, brought for the recovery of a specific piece of property, and the question is the value of the property mentioned in the complaint, and not the property represented by the certificate.
Objection overruled.
Exception reserved by defendant.

A. The par value of the stock would be fifteen hundred dollars. The book value of the stock is eighteen hundred dollars; a hundred and twenty dollars a share.

Q. When you say the "book value," what do you mean by that? Is that the market value?

A. The market value approximates the book value. Your question I couldn't answer, because that is a mere matter of barter and sale between parties. I would say the value of the stock today was its book value—eighteen hundred dollars."

183 "Cross-examination.

By Mr. J. F. Gallaher:

Q. Has the stock any market value, Mr. Vail?
A. General market value, you mean?
Q. Yes. Would you say it has?
A. No sir; I couldn't say it has.
Q. There has not been enough of it sold to create a market value?
A. There has not been enough of it sold or transferred to create a market value. The transfers are very few.

Redirect examination.

By F. E. Osborn:

Q. When you say the transfers are very few—have there been any transfers of it?
A. Yes sir.
Q. And do you know at what price those transfers were made?

Objected to by counsel for defendant for the reason that that is not putting any value on it.

It is admitted by counsel for defendant that the stock—not the certificate, but the stock—is worth eighteen hundred dollars, as a value for the purpose of this action."

184 "Counsel for plaintiff offers in evidence certificate number three hundred and eighty-five, above referred to, which is marked "Exhibit 1," and which counsel proceeds to read to the jury, as follows:

Mr. Osborn: That, we can state to the jury is the same certificate that has been read in evidence heretofore."

185 *G. F. Kreidler—Direct Examination.*

G. F. KREIDLER, a witness called on behalf of the plaintiff, being first duly sworn was examined by Frank Osborn and testified as follows:

Direct examination.

By Frank Osborn:

Q. You may state your full name.
A. G. F. Kreidler.
Q. Where do you live?
A. Michigan City, Indiana.

Q. What is your business?
A. President of the First National Bank of Michigan City.
Q. What is your age?
A. Forty-four.
Q. For how long have you been president of that bank?
A. It will be two years in April.
Q. How long have you been connected with that bank?
A. Almost a quarter of a century.
Q. You say you have been connected with the First National Bank of Michigan City for a quarter of a century?
A. Twenty-two and a half or twenty-three years.
Q. In what capacity have you been connected with that bank during that time?
A. I started as clerk and worked up to president.
Q. Were you at one time cashier?
A. Cashier fifteen years—yes sir.
Q. Are you acquainted with the plaintiff in this case Mary Opperman?
A. Yes sir.
Q. How long have you known her?
A. Known her all my life.
Q. And are you acquainted with her husband, Henry Opperman?
A. Yes sir.
186 Q. How long have you known him?
A. Know- him all my life.
Q. Where have Mary Opperman and Henry Opperman lived during the time you have known them?
A. Michigan City.
Q. Do you know about when they were married?
A. No sir.
Q. You would say approximately how many years ago?
A. I wouldn't like to state because I don't remember.
Q. Were you acquainted with the father of Mrs. Opperman?
A. John Krueger, the father, yes sir.
Q. Is he now living or dead?
A. He is dead.
Q. What connection, if any, did he have with the First National Bank of Michigan City during his lifetime?
A. Stockholder and director of the First National Bank.
Q. And do you know how much of the stock of that bank he held at the time of his death?
A. I did know, but I have forgotten.
Q. Did his wife survive him?
A. Yes sir.
Q. That was the mother of Mrs. Opperman?
A. Yes sir.
Q. After the death of John Kreuger who held the stock in the First National Bank that had been held by John Krueger, up until the death of his wife?
A. The widow of John Krueger, Wilhelmina Krueger.

Q. On her death do you remember who was the administrator of her estate?

A. Rudolph A., her son.

Q. Do you know what was done with the stock that she and her husband had held in the First National Bank—to whom it was distributed?

A. Yes; Mrs. Opperman got part of it—she got fifteen shares—and another daughter got five shares.

187 Q. I will ask you whether or not at the time of the distribution and settlement of the estate of Mrs. Krueger the fifteen shares which were assigned to Mrs. Opperman were transferred to her upon the books of the bank?

A. Yes, sir, it was.

Q. And was a certificate issued to Mary Opperman?

A. Yes sir.

Q. I will ask you whether or not that certificate which was issued to Mary Opperman was the—you remember the number of that certificate that was issued to Mary Opperman?

A. No sir.

Q. Did Mary Opperman, at any time, have any other stock in the First National Bank except this fifteen shares which she got from her mother's estate?

A. No sir, that was all.

Q. I will ask you whether or not that stock which was issued to Mary Opperman has ever been transferred from her name to the name of any other person on the books of the corporation—on the books of the bank.

A. It has never been transferred on the books of the bank; it still stands in her name.

Q. Has that stock ever been presented to your bank for transfer?

A. Not to me.

Q. Has it ever been presented to any one connected with your bank to your knowledge?

A. Not to my knowledge.

Q. Do you remember, or can you give, the date when that stock was issued to Mrs. Opperman?

A. I cannot without going back to the stock ledger; you see I have so many transfers I can't remember the dates.

188 Q. If that certificate of stock was dated August 20th, 1904 what would you say as to that being the date when it was put in her name?

A. I think that is about right.

Q. Now then, during the time that this stock has been in the name of Mrs. Opperman has she drawn—have there been any dividends declared upon that stock?

A. Yes sir.

Q. How often, since August 20, 1904, has your bank declared dividends?

A. Every six months—the first of January and the first of July.

Q. And what were the dividends apportioned to this fifteen shares of stock in the year 1905?

A. $120 a year.
Q. And in how many instalments was that dividend declared?
A. Two.
Q. And what was the amount of each instalment?
A. $60.
Q. Who, if any one, drew the dividends on that stock in the year 1905?
A. Was that when Jim Gallaher stopped me paying it, or was that before the time Jim stopped me paying it? Jim served me with a notice, but I don't know the date that Jim served me with that notice.
Q. You don't know the date of that notice?
A. No.
Q. To call your attention to the matter so as to refresh your recollection I will call your attention to a paper which purports to be a dividend sheet of your bank and call your attention to the certificate of stock purporting to be in the name of Mary Opperman and the receipt, July 21, 1905, and see if that will refresh your recollection, and if so, state, if you will to whom the dividend of July, 1905 was paid.

189 A. That was paid on July 21st, 1905 to Mrs. Opperman's brother, Rudolph A. Kreuger, who said she sent him to get it.

The defendant moves the court to strike out the words "who said she sent him to get it."
The court sustains the motion.

Q. Now then, as to the dividend which was declared in January, 1905—that would be the dividend before this one which you say was paid over to her brother—do you know whether or not that was drawn by Mrs. Opperman or anybody for her?
A. Yes sir, it was.
Q. By whom was that dividend drawn?
A. I can tell if you will let me look at the sheet.

(Mr. Drummond hands a paper to the witness.)

A. That was paid to Mary Opperman on January 3, 1905, but Mary Opperman didn't come to the bank to get the money.

The defendant moves the court that the answer of the witness be stricken out as not being responsive to the question.
The reporter reads the question.

A. Mary Opperman.
Q. Now then, after the payment of the dividend of January, 1905, the one of July having been paid to her brother, have any more of the dividends been paid since that time?
A. Well sir, we paid the dividends to Mary Opperman up to the time that James Gallaher, an attorney of Michigan City, served notice on the bank not to pay them to her any more: that he would

hold us liable if we did. We stopped payment then; I
190 haven't got the date of that notice.

Q. I will see if I can find something that will fix the date of that notice.

A. Prior to that notice we paid them all to her.

Mr. Osborn: Have you got the date of that notice, Mr. Arnt?

Mr. Arnt: It was after you got busy.

Mr. Osborn: Is there any question but what that notice was served about the time this suit was commenced.

Mr. Arnt: I think so.

Q. What dividends have been declared by your bank on this fifteen shares of stock each year since the dividend that you have testified to was paid to Mrs. Opperman through her brother, Mr. Krueger.

A. $120 a year.

Q. Each year?

A. Each year.

Q. What has been done with those dividends that have accrued since you say you were notified by Judge Gallaher not to pay any more of them to her?

A. I have got them.

Q. You say you have them: where are they?

A. In the bank.

Q. In what form are thos- dividends there in the bank?

A. They are in dividend checks.

Q. Special deposit?

A. Judg- the regular dividend check not drawing interest.

Q. And are they, and have they always been, held there ready to be paid to whoever may be shown to be entitled to them?

A. Yes sir.

Q. What is the amount of the accumulated dividends now held by your bank on this fifteen shares of stock?

A. $900.

191 Q. And those dividends have been set of-, as I understand it, every six months, $60 each?

A. Yes sir, every six months.

Q. I will ask you whether or not your bank also received a notice on behalf of Mrs. Opperman not to pay these dividends or transfer the stock to the Citizens Bank.

The defendant objects to the question.

Question withdrawn.

Q. Do you remember the circumstances of a suit being commenced by Mrs. Opperman against the Citizens Bank, involving the title to this fifteen shares of stock? Do you recollect about the time that suit was commenced?

A. Yes sir.

Q. I will ask you whether or not about the time that suit was commenced any notice was given or anything said by Mrs. Opperman or her attorney to anyone connected with your bank about

that stock not being transferred or the dividends not being paid to the Citizens Bank?

The defendant objects to the question.
Question withdrawn.

Q. Mr. Kreidler, are you acquainted with the market value of the stock of the First National Bank of Michigan City, Indiana, at the present time?
A. Yes sir.
Q. What is the fair market value of this fifteen shares of stock involved in this case and which is in the name of Mary Opperman on the books of the bank at the present time?
A. It is worth $150 a share.
Q. Now, in giving that value of $150 a share do you take into consideration the dividends which have accumulated and which are lying there in the bank?
192 A. That is independent of those dividends; with those dividends the stock is worth $3,150.
Q. And then, independent of the dividends the stock would be worth how much?
A. $2,250; $150 a share.
Q. This certificate of stock which was issued to Mrs. Opperman—I will ask you whether or not the value which you have given here upon fifteen shares of stock has reference here to that certificate of Mary Opperman.
A. Yes sir.
Q. Speaking of these dividends which now amount to $900, I will ask you: does that include the January dividend for 1913?
A. Yes sir.
Q. Have these dividends, at any time, been transferred to Mary Opperman on the books of the bank or to any other person?
A. No sir.
Q. Has the First National Bank of Michigan City, Indiana, a set of by-laws?
A. Yes sir.

The defendant objects to the question and moves the court to strike out the answer on the ground that the fact as to whether or not a corporation has by-laws can best be proved by producing the records of the corporation which passed the by-laws, and that that is the best evidence of the existence of by-laws; that of the existence of by-laws, where the record is in existence, the passage in the same and the by-laws themselves are the best evidence.
193 The court overrules the objection and motion.
The defendant excepts.

Q. Where are those by-laws? In what shape are they?
A. They are in that book right there on the table.
Q. Is that book which you have referred to a book which you brought with you today?
A. Yes sir.

Q. And where has that book been kept as long as you have known it?

A. In the vaults of the First National Bank of Michigan City.

Q. I will ask you whether or not it is now in your custody?

A. Yes sir, it is.

Q. What is your bank there—is it a national bank?

A. Yes sir.

Q. Organized under the laws of the United States?

A. Yes sir; First National Bank; national charter.

Q. Does the book which you have brought in and which you have mentioned contain the record of those by-laws?

A. Yes sir.

Q. I wish you would look at that book, if you will, and turn to the page on which the by-laws are entered.

A. The by-laws commence on page 16.

Q. And continue over on what pages and to what page?

A. 16, 17, all of page 18, all of page 19, all of page 20, all of page 21, all of page 22, all of page 23, and a third of page 24.

Q. I will ask you whether or not the by-laws as shown upon the pages you have mentioned are the by-laws which have been used by that bank in connection with its business during your
194 connection with the bank.

The defendant objects to the question upon the ground that it is not show that the record which was made by the corporation enacting and passing the by-laws is not in existence, and that it is not permissable to prove bylaws by usage or custom except under the rule of necessity where there is not in existence a record of such by-laws. For the further reason that the by-laws, or what the by-laws state, are not material under any issue here and do not tend to prove any material fact in issue.

The court overrules the objection.

The defendant excepts.

A. Yes sir.

Q. Are you familiar with those by-laws, Mr. Kreidler?

A. Yes sir.

Q. Is there, among the by-laws, any by-law on the subject of the transfer of stock, and if so, will you please refer to it and give us the portion of the by-law and the page upon which it appears?

A. Yes sir; section 17 of the by-laws fully covers the transfer of stock.

The defendant objects to the answer of the witness and moves the court that it be stricken out on the ground that it expresses the mere opinion of the witness, and not a fact.

195 The court directs that the word "fully" be stricken out.

Q. Section 17; what is the page?

A. Page 22.

Q. I will ask you whether or not section 17 that you have just referred to was in existence on and prior to September 19, 1905.

A. Yes sir.

Q. And for how long has that section 17 been in existence to your knowledge?
A. Since 1882. To my knowledge?
Q. Yes.
A. 1890.
Q. That you have known of it?
A. Yes sir.
Q. Is there in that book a record of the minutes of any meeting of the board of directors of that bank, which has reference to the by-laws?
A. Yes sir.
Q. On what page are the records of that meeting?
A. On page 26 is a record of the board of directors in which——

Mr. Drummond: Wait a minute—you have answered the question.

The plaintiff offers in evidence section 17 of the by-laws of the First National Bank of Michigan City as shown on page 22 and as identified by the witness, Mr. Kreidler.

Whereupon, it being 12 o'clock, noon, court adjourns until 1:30 P. M.

196 1:30 o'clock P. M., January 15, 1913.

Trial resumed.

The plaintiff renews his offer of section 17 of the by-laws of the First National Bank of Michigan City as shown on page 22 and as identified by the witness, Mr. Kreidler.

The defendant objects to the reasing of the alleged by-laws for the reason that it is now shown that the alleged by-law was passed by the corporation.

The plaintiff withdraws the offer for the present.

Q. I will ask you if the record book which you identified this forenoon contains the record of a meeting of the board of directors of the First National Bank in which it shows some steps taken toward the adoption, or rather toward the preparation of by-laws, and if so, what was the date of that meeting and on what page?
A. On page 25, June 8, 1882.
Q. And then, is there, subsequently, any record of a subsequent meeting at which any action was taken which appears to show any action by the board of directors upon the subject of by-laws—if so, of what date and on what page?
A. On June 8, page 25, the committee——

The defendant objects to the remark of the witness.

197 The court orders that the answer of the witness be stricken out and that the witness pay attention to the question.

Q. After the meeting of June 8, 1882, as shown by the record on page 25, is there a record of a subsequent meeting showing any

action in relation to by-laws? If so on what page is the record of the meeting?

The defendant objects to leaving the witness to interpret the alleged record and put his interpretation on it as to what it shows; the record is the best evidence.

The court overrules the objection.

The defendant excepts.

A. On page 26 there is a report——

The defendant asks that the answer be stricken out.

The court rules that the words "there is a report" may be stricken out.

The defendant excepts.

The plaintiff offers in evidence page 25 of the record book of the First National Bank of Michigan City, Indiana, as testified to by the witness.

The defendant objects to the admission of the record offered for the reason that said record does not purport to show that the
198 action taken was with respect to the by-laws or sections of the by-laws which have been heretofore identified by the witness, and therefore it is not competent as proof identifying the by-laws or sections thereof which the plaintiff claims were the by-laws in force at the time of the assignment of the certificate of stock in question.

The Court: You are going to follow this up by showing the acoption?

Mr. Osborn: Yes.

The court overrules the objection.

The defendant excepts.

Page 25 of the record book of the first National Bank of Michigan City, Indiana, read in evidence as follows:

"Michigan City, Indiana,

June 8, 1882.

At a meeting of the Board of Directors of the First National Bank of Michigan City, Indiana, held on the above date there were present George Ames, C. F. De Wolfe, J. H. Orr, M. G. Sherman, Walter Vail and John Krueger.

Doct. M. G. Sherman was elected chairman of the meeting and Walter Vail secretary. The Board then proceeded to the election of officers which resulted in the choice of George Ames for President and William Schoeneman Vice-President. The Board appointed Walter Vail Cashier. The Board appointed C. E.
199 De Wolfe, J. H. Orr and Walter Vail as a committee to prepare a code of by-laws. The Board ordered that a call for 50% of the capital stock or $125,000.00 be made to be paid in on or before June 15th, 1882. The Board appointed M. G. Sherman, John H. Barker and George Ames as a committee to appraise the

value of the personal property of the Old Bank for the purpose of determining the price at which the New Bank would purchase it.

There being no further business before said meeting the board adjourned.

GEO. AMES, *Prest.*

Attest:

W. VAIL, *Cash.*"

200 The plaintiff now offers in evidence page 26 of the record book of the First National Bank of Michigan City, Indiana, identified by the witness Kreidler.

The defendant objects to the introduction of the evidence offered for the reason, first: that the record offered does not show upon its face that it was a meeting of the stockholders of the corporation, nor does it show that it was a meeting even of the directors of the corporation. For the second reason: that the by-laws of a banking corporation organized under the laws of the United States can only be passed and adopted by the stockholders.

The court overrules the objection.

The defendant excepts.

Page 26 of the record book of the First National Bank of Michigan City, Indiana, read in evidence as follows:

"Michigan City, Indiana,

June 23, 1882.

Meeting New Bank. Present George Ames, C. E. De Wolfe, J. H. Barker, W. G. Sherman, J. H. Orr, Walter Vail. The committee on by-laws appointed at the meeting held June 8th submitted their report and upon motion the code of by-laws as submitted, were unanimously adopted and ordered to be sperad upon the record book.

201 The committee appointed by the Board June 8th to appraise the value of the personal property of the Old Bank reported that they had fixed the value of the furniture and fixtures &c. at $3,500.00, and the value of the banking house at $4,000.00, and these figures being satisfactory to the committee appointed by the Old Bank, the report was approved and the cashier instructed to pay the Old Bank the sum of $7,500.00 and to receive title to the property.

There being no further business to come before the Board they adjourned.

GEO. AMES, *Prest.*

Attest:

W. VAIL, *Cash.*"

202 The plaintiff now offers in evidence that part of page 22 of the record book of the First National Bank of Michigan City, Indiana, as identified by the witness Keridler, which purports to be and show section 17 of the by-laws, commencing with the words "Section 17," and ending with the words "On which the dividends are declared."

The defendant objects to the evidence offered for the reason that it has not been shown that the section of the by-laws referred to and offered in evidence was passed and adopted by the banking corporation. Second: that the record which has heretofore been offered for purposes of identification and as proof of the passage of the by-laws does not show that the section offered now was one of the sections of the by-laws mentioned in the record heretofore introduced or that the by-laws, or that the alleged by-laws, from which this section is taken are the same by-laws which are mentioned in the record previously introduced.

The court overrules the objection.

The defendant excepts.

That part of page 22 of the record book of the First National Bank of Michigan City, Indiana, beginning with the words "Section 17," and ending with the words "on which the dividends are de-
203 clared" read in evidence as follows:

"Section 17. The stock of the Bank shall be assignable only on the Books of this bank subject to the restrictions and provisions of the act and a transfer book shall be kept in which all assignments and tranfers of stock shall be made; and it is provided that no such transfer of stock shall be made by any stockholder who is indebted to said bank until such indebtedness is paid or provided for except upon permission of the board of directors first obtained. Transfers of stock shall not be suspended preparatory to a declaration of dividends and except in cases of agreement to the contrary expressed in the assignments dividends shall be paid to the stockholders in whose name the stock shall stand on the day on which the dividends are declared."

Q. Mr. Kreidler, is there, in this record book which you have identified, of the First National Bank of Michigan City, Indiana, a record of the articles of association?

A. Yes sir.

Q. Let me add to that: of this bank, and if so, on what pages is that record.

A. On page 2.

Q. And for how far does it proceed in the record?

A. All of page two, all of page three, all of page four, all of page five and two-thirds of page six.

Q. Do you say you are familiar with those records?

A. Yes sir.

Q. Is there, in the articles of incorporation, a provision relating to directors, as to who shall be directors, at the time of the or-
204 ganization, and if so, can you designate the part?

A. Yes sir.

Q. Of those articles, by page and section.

A. Page two, section third.

The plaintiff now offers in evidence section three of the articles of incorporation of the First National Bank of Michigan City, Indiana, as shown on page two of the record book, identified by the witness Kreidler.

Page two, section three, of the articles of incorporation of the First National Bank of Michigan City, Indiana, read in evidence as follows:

Section 3, Articles of Incor., 1st Nat. Bank.

"Third. The Board of Directors shall consist of nine stockholders. And the following persons, George Ames, Charles E. De Wolfe, Jared H. Orr, John H. Barker, Wm. Schoeneman, John Krueger, Walter Vail, Jr., M. G. Sherman and John Reynolds are hereby appointed Directors of the Association to hold their offices as such until the regulation election takes place pursuant to the fourth article of the Articles of Association, and until their successors are chosen and qualified.

The first meeting of the shareholders for the election of directors shall be held at Michigan City, Indiana, on the second Tuesday in June, 1883, or at such other place and time as a majority of the undersigned shareholders may direct."

205 The plaintiff now offers in evidence pages two, three, four, five, and that part of page six on which there is writing, of the record book of the First National Bank of Michigan City, Indiana.

Pages two, three, four, five, and that part of page six on which there is writing, of the record book of the First National Bank of Michigan City, Indiana, read in evidence is as follows:

"Articles of Incorporation.

For the purpose of organizing an association to carry on the business of banking under the laws of the United States the undersigned subscribers for the stock of the association hereinafter named, do enter into the following articles of incorporation:

First. The name and title of this association shall be The First National Bank of Michigan City, Indiana.

Second. The place where its banking house or office shall be located and its operations of discount and deposit carried on, and its general business conducted, shall be at Michigan City, Indiana.

Third. The Board of Directors shall consist of nine stockholders. And the following persons, George Ames, Charles E. De Wolfe, Jared H. Orr, John H. Barker, Wm. Schoeneman, John Krueger, Walter Vail, Jr., M. G. Sherman and John Reynolds are hereby appointed Directors of the Association to hold their offices as such until the regular election takes place pursuant to the fourth article of
206 the Articles of Association, and until their successors are chosen and qualified.

The first meeting of the shareholders for the election of directors shall be held at Michigan City, Indiana on the second Tuesday in June, 1883, or at such other place and time as a majority of the undersigned shareholders may direct.

Fourth. The regular annual meetings of the shareholders for the election of Directors shall be held at the banking house of this association on the second Tuesday of January of each year, but if no election shall be held on that day it may be held on any other day, according to the provisions of section 5149 of the revised statutes; and all elections shall be held according to such regulations as may be prescribed by the Board of Directors, not inconsistent with the aforesaid provisions of the said section 5149 of the revised statutes.

Fifth. The capital stock of this association shall be Two Hundred and Fifty Thousand Dollars ($250,000.00) to be divided into shares of One Hundred Dollars each; but the capital stock may be increased according to the provisions of section 5142 of the revised statutes to any sum not exceeding Five Hundred Thousand Dollars ($500,000.00), and in case of the increase of the capital stock of the association, each shareholder shall have the privilege of subscribing for such numbers of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock increased.

Sixth. The Board of Directors (a majority of whom shall
207 be a quorum to do business), shall elect one of their number to be president of this association, who shall hold his office (unless he shall be disqualified or be sooner removed by a two-thirds vote of all the members of the Board), for the term for which he was elected as director; and they shall have power to elect a vice-president who shall also be a member of the Board of Directors, and who shall be authorized, in the absence or inability of the president from any cause, to perform all acts and duties pertaining to the office of president except such as the president only is authorized by law to perform; and to elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the association; to fix the salaries to be paid to them, and continue them in office or to dismiss them as in the opinion of a majority of the board the interests of the association may demand.

They shall have power to define the duties of officers and clerks of the association and to require bonds from them and to fix the penalty thereof; to regulate the manner in which the elections of directors shall be held, and to appoint judges of the elections; to provide for an increase in the capital of the association and to regulate the manner in which such increase shall be made; and generally, to do and perform all the acts that it may be legal for a board of directors to do under the revised statutes aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make, not inconsistent with law,
for the general regulation of the association and the man-
208 agement and administration of its affairs.

Seventh. This Association shall continue for the period of twenty years from the date of the execution of its organization certificate unless sooner dissolved by the act of its shareholders owning at least two-thirds of its stock, and may be dissolved and

closed by the association in such manner as they may deem to be for the interest of the shareholders and creditors of the association, subject to the restrictions, requirements and provisions of the laws of the United States.

(Amended by unanimous vote or request of stockholders to continue business to May 22, 1922. Recorded March 3, 1902. W. Vail Pr.)

Eighth. These articles of association may be changed or amended at any time by shareholders owning a majority of the stock of the association in any manner not inconsistent with law; and the Board of Directors, or any three shareholders, may call a meeting of the shareholders for this or any other purpose not inconsistent with law by publishing notice thereof for thirty days in a newspaper published in the town, city or county where the bank is located, or by notifying the shareholders in writing.

In witness whereof we have hereunto set our hands this twenty-second day of May, Eighteen Hundred and Eighty-Two.

JOHN REYNOLDS.
JOHN H. BARKER.
C. E. DE WOLFE.
GEO. AMES.
WALTER VAIL, JR.
209 M. G. SHERMAN.
JAMES H. ORR.
ALBERT T. VREELAND.
LYMAN B. ASHTON.
WM. SCHOENEMAN.
DAVID MARSH.
ZIBA W. PALMER.
JOHN KRUEGER.
F. E. MILLER.
F. SULLIVAN.
WM. OHMING.
WALTER VAIL.
MRS. S. L. BOWES.
MISS S. L. BOWES.
WM. BLINKS.
JAMES MENDOCK.

1. I certify that the articles of association of the First National Bank of Michigan City, Indiana, were executed in duplicate and that one of the instruments *was* executed is the foregoing; and that the other, in all respects like the foregoing, is on file with said bank.

WALTER VAIL, *Cashier.*

May 22d, 1882."

210 Q. Now, Mr. Kreidler, at the expiration of the first 20 years of the existence of this Bank of Michigan City, I will ask you whether or not there was any action taken, or resolution passed by the board of directors of the First National Bank relat-

ing to the continuation of its business, and if so on what page is the record of the action?

A. Page 203.

Q. On what part of the page?

A. The lower half of page 203.

Q. I will ask you whether or not the First National Bank has been in business continuously from a period prior to March 3, 1902 up to the present time.

A. Yes sir.

Q. State, if you know, whether or not there was an extension of the charter granted by the United States Government.

A. Yes sir.

Q. To what time?

A. The charter was extended for twenty years to 1922.

The plaintiff now offers in evidence that part of page 203 of the record book of the First National Bank of Michigan City, Indiana, identified by the witness Kreidler, commencing with the words "Michigan City, Indiana, March 3, 1902," and to the end of that page.

That part of page 203, beginning with the words "Michigan City, Indiana, March 3, 1902" to the end of the page read in evidence as follows:

"Michigan City, Ind., Mar. 3/1902.

At a meeting of the Board of Directors of the First National Bank of Michigan City, Indiana, held on above date at ten
211 o'clock A. M. there were present Walter Vail, Pr., M. Albert Vpt., Directors Wolffe, Frank Schauffele & J. F. Kreidler.

Minutes of the meeting held on Jany. 1st 1902 were read & approved.

The seventh article of the articles of association was, by unanimous request of the stockholders, amended to read as follows: This Association shall continue until close of business on May 22/1922 unless sooner placed in voluntary liquidation by the act of its shareholders owning at least two-thirds of its stock, or otherwise dissolved by authority of law.

No further business appearing, board adjourned.

W. VAIL, *Pr.*

Attest:

W. VAIL, *Secy.*"

212 Cross-examination.

By C. P. Drummond:

Q. Mr. Kreidler, calling your attention to your testimony in regard to the payment of dividends January 3rd, 1905: now you stated that that dividend was paid to Mary Opperman, didn't you, this morning?

A. Yes sir.

Q. Do you say that is Mrs. Opperman's signature? (indicating)
A. No sir.
Q. Whose signature is that?
A. I think that is the signature of her husband, Henry Opperman.
Q. You know it, don't you?
A. No.
Q. Did you ever see his signature?
A. Yes.
Q. Writes with a gold pen?
A. Not always; we haven't any in the bank.
Q. You can't afford it I suppose?
A. We could afford it if we didn't have to hire a lawyer so often.
Q. Is this your lawsuit?
A. I thought it was.
Q. Let us get back to this: you know, don't you now, without any quibbling about it, that that was Henry Opperman's signature?
A. No sir; I think it is.
Q. What did you tell the jury this morning for that you paid that dividend to Mary Opperman?
A. I want to explain to the jury.
Q. What did you say that for?
A. She got the money.
Q. Did you pay it to her?
A. No sir, but she got the money.
Q. You don't know whether she got the money or not, do you?
213 A. Sure I do.
Q. You gave it to Henry Opperman?
A. And he gave it to her.
Q. How do you know that?
A. She would have come there if she hadn't got it.
Q. So you want to testify under oath when you don't know whether it was delivered or not?
A. I know he gave it to her.
Q. You didn't give it to her, did you?
A. No.
Q. Looking at the dividend paid July 21st, 1905——
A. Yes sir.
Q. You told the jury this morning that that was paid to Mary Opperman too, didn't you?
A. Yes sir.
Q. You didn't pay it to Mary Opperman, did you?
A. No sir—not directly.
Q. You didn't pay it to Mary Opperman?
A. No sir.
Q. Nor the equivalent of it?
A. No sir
Q. Yet her name is signed there?
A. Yes sir.
Q. That is not her signature, is it?

A. No sir.
Q. Both those dividends were paid in cash, too, wer-n't they?
A. Yes sir.
Q. This last one, signed Mary Opperman, was paid to Mr. Krueger?
A. Her brother—yes.
Q. You knew that this morning when you said it was paid to her?
A. Yes sir.
Q. Yet you said the cash was paid to her?
A. I didn't say the cash was paid to her.
Q. Didn't you say it was paid to her?
A. I said it was paid to Mary Opperman.
Q. It was not?
214 A. Sure; she sent her brother to get it.
Q. Somebody that signed the name of Mary Opperman?
A. Yes, her brother; she sent her brother to the bank and he got it.
Q. You don't know whether *she* sent him or not, do you?
A. Yes.
Q. Did you hear her tell him to go?
A. No.
Q. You are guessing at that?
A. She would send him to the bank for her——
Q. You are guessing at that?
A. No.
Q. And those are the only two dividends—the ones to which I have called attention—that you ever paid since this—on this particular certificate, since Mary Opperman is alleged to have owned it?
A. I don't know; I haven't the other dividend sheets to look at.
Q. Don't you know you never paid any other dividends to Mary Opperman?
A. No; you must remember I am not the only man in the bank.
Q. Don't you know, as an official of the bank, that those are the only two dividends that have been paid and the cash handed over, now——
A. No, I don't know.
Q. —at your bank on the certificates since Mary Opperman got *it* from her mother?
A. I don't remember the date it was put into her name; if I had my stock book I could tell you exactly.
Q. Didn't you tell Mr. Osborn this morning in your direct examination as to the value of this stock that the other dividends were withheld and in your bank on a notice served on you by
215 Mr. Gallaher?

The plaintiff objects to the question for the reason it is wholly immaterial as to what he testified to this morning, and not cross examination; the testimony is before the jury.

The court overrules the objection.
The plaintiff excepts.

A. Yes sir.
Q. And those dividends represent all the dividends except those two that you have testified to as having been paid, do they not?

The plaintiff objects to the question unless he states in his question the beginning of the period.

Q. Barring the ones dated July 21, 1905 and January 3, 1905.

The plaintiff renews his objection to the question unless he states in his question the beginning of the period referred to.
The court overrules the objection.
The plaintiff excepts.

A. I can't answer it then; you give me no date to go by.
A. The dividends which you hold now, and the dividend paid on July 21, 1905, and the dividend paid on January 3, 1905, represent, do they not, all the dividends which have accrued on the certificate of stock which came to Mary Opperman, from the
216 time it came to her?

A. I have got $900 and you have got two dividends there of $60 each, haven't you? That would make $1020; and the dividends are $120 a year so that would go back ten years, wouldn't it? I don't know when she got this stock; if she has had this stock, that would cover the period; without the records I can't tell when she got it.
Q. So you can't state?
A. I can't tell—no; that would be $1020.
Q. Can you tell this: can you tell the jury whether or not those two payments of January 3, 1905 and July 21, 1905 are the only dividends that have been paid to Mary Opperman since she owned this stock?
A. No, I can't.
Q. Will you please tell the jury how it was, then, that you proceeded to tell what the dividends accumulated on this stock—this certificate—were?
A. Yes sir; I have the money; I have $900; I counted it this morning before I came over.
Q. You have the money?
A. Yes sir: $900 in dividend checks that I have got in an envelope.
Q. When does that accumulation of dividends commence on that certificate of stock?
A. Well, $900: that would be seven and one-half years, wouldn't it?
Q. I thought you said a while ago that it took ten years to make that.
A. No: I was asking you to help me out.
Q. Mr. Kreidler, it is a fact, is it not, that when dividends are paid at your bank—paid upon stock—that you require a receipt

217 • for the dividend to be signed in the name of the person in whose name the stock appears upon the books of the bank?
A. Yes sir.

Mr. Osborn: The plaintiff desires to state to the court and to counsel for defendant that, inasmuch as it appears that the original certificate of stock which is in controversy here in this case—the paper itself—has been lost, that the plaintiff will accept, now or at any time within reasonable time after the finish of the trial of this case, or at any time before the finish of the trial of this case, in lieu of the original certificate, a duplicate of that certificate which may be procured from the First National Bank in such shape as to show and evidence the rights of the plaintiff in and to her fifteen shares of stock in that bank, and to the accumulated dividends.

Whereupon the plaintiff rested her case.

218 And afterwards, to-wit: On the 10th day of September, 1913, the same being the 93rd Judicial day of the May Term 1913 of said Appellate Court, the following further pleas and proceedings were had in said cause to-wit:
Come now the parties, by their counsel, and this cause is submitted to the court for judgment and decree as provided by the act of the General Assembly of the State of Indiana, approved April 13, 1885, and the rules of said Supreme Court adopted in relation thereto.

219 And afterwards, to-wit, on the 6th day of November 1913, the same being the 142nd Judicial Day of the May Term 1913 of said Appellate Court, the following further pleas and proceedings were had herein:
Comes now the appellant, by counsel and files eight (8) copies of its original printed brief in the words and figures following: (H. I.)

220 And afterwards to-wit, on the 7th day of February, 1914, the same being the 67th Judicial Day of the November Term 1914, of said Appellate Court, the following further pleas and proceedings were had herein:
Comes now the appellee, by counsel, and files her original printed brief (8), which brief is in the words and figures following: (H. I.)

221 And afterwards, to-wit, on the 14th day of March, 1914, the same being the 96th Judicial Day of the November Term 1914 of said Appellate Court, the following further pleas and proceedings were had herein:
Comes now the appellant, by counsel and files its reply briefs (8) in the words and figures following, to-wit: (H. I.)

222 And afterwards, to-wit on the 26th day of May, 1915, the same being the 3rd Judicial Day of the May Term 1915 of said Supreme Court, the following further pleas and proceedings were had in the above entitled cause:
Come the parties by counsel, and the Court being sufficiently ad-

vised in the premises, transfers the above entitled cause, Citizens Bank of Michigan City, Indiana vs. Mary Oppermar number in the Appellate Court (8709) to the Supreme Court of the State of Indiana to Number 22832 under the Acts of 1901, page 590.

223 And afterward to-wit: On the 13th day of February, 1917, the same being the 68th Judicial Day of the November Term 1916 of said Supreme Court, the following further pleas and proceedings were had in said cause:

Come the parties, by their attorneys, and the Court being advised in the premises affirms the Judgment of the St. Joseph Superior Court in the above entitled cause with an opinion pronounced by Harvey, J., which said opinion is in the words and figures following to-wit:

224 THE STATE OF INDIANA:

In the Supreme Court, November Term, 1916, on the 13th day of February, 1917, Being the 68th Judicial Day of said November Term, 1916.

No. 22832.

Hon. Moses B. Lairy, Chief Justice.
Hon. Richard K. Erwin,
Hon. John W. Spencer,
Hon. David A. Myers,
Hon. Lawson M. Harvey,
Associate Judges.

In the Case of

CITIZENS BANK OF MICHIGAN CITY, INDIANA,

vs.

MARY OPPERMAN.

Appealed from the St. Joseph Superior Court.

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by

HARVEY, *J.*:

225 Transf[illegible]der Sec. 1405, Burns, 1914.

In this action Appellee seeks as owner to recover by replevin a certificate for fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana.

At the first trial the court directed a verdict for the defendant; and from the judgment on this verdict the plaintiff appealed. The

Appellate Court reversed the judgment. (See Opperman vs. Citizens Bank of Michigan City, 44 Ind. App. 401) Upon the return of the cause defendant filed an amended second paragraph of answer, to which a demurrer was sustained. Upon a trial of the issue formed by the complaint and a general denial, the verdict was for the plaintiff, and a judgment was entered for the recovery of the certificate, which was found to be of the value of thirty-one hundred and fifty dollars.

Defendant appealed to the Appellate Court, and the cause was, under Section 1405 of Burns' R. S. 1914, transferred to this court. Appellant assigns as error:

(1) The sustaining of the demurrer to the amended second paragraph of answer.

(2) The overruling of Appellant's motion to modify the judgment.

(3) The overruling of Appellant's motion for a new trial.

As to the overruling of said motion to modify the judgment, Appellant makes no point, cites no authority, and presents no argument, hence the same is not further noticed.

The amended second paragraph of answer alleges, in substance, as an estoppel against the plaintiff that though the stock represented by the certificate was her separate and individual property, and though she was at the time a married woman, she allowed her husband to pledge the same as collateral to secure three notes upon which he alone was indebted to the defendant; that the plaintiff signed the blank form of assignment and power of attorney printed on said certificate without restrictive conditions; that the husband represented to defendant that he was the owner of said certificate; and defendant had no notice or knowledge that the plaintiff had, or claimed, any interest in said certificate; that defendant never at any time had any contract of suretyship with the plaintiff.

226 To constitute reversible error, the sustaining of the demurrer to this answer must have been harmful to Appellant in that Appellant was thereby denied opportunity to prove estoppel.

The record discloses that evidence was admitted upon all matters set up in this answer. It does not disclose that any offered evidence bearing upon an estoppel was excluded. The record shows that Appellant tendered and the court gave instructions to the jury covering fully all matters alleged as to estoppel, and covering all the evidence relating thereto. The whole trial appears to have proceeded upon the theory that in actions of replevin all defenses, including estoppel, are permissible under the general denial. As appellant was not so deprived of any advantage, Appellant was not harmed and justice to Appellant does not require that this court determine the sufficiency of said answer, nor whether estoppel is provable under the general denial in actions for replevin.

Under the assigned error in overruling the motion for a new trial, Appellant claims that the court by instructions five and six placed upon Appellant the burden of proving the defense of estoppel. The court expressly charged the jury that the burden of establishing her right to recovery of said certificate was upon Appellee;

and the court expressly charged that the burden of establishing by a fair preponderance of the evidence an estoppel as a defense was upon the Appellant. This charge was correct as to the burden of proof of an estoppel. Morgan vs. Hoadley, 156 Ind. 320, Waterbury, et al. vs. Miller, 13 Ind. App. 197; Newcastle Bridge Co. vs. Doty, 168 Ind. 259; McAdams vs. Bailey, 169 Ind. 518; Cunningham vs. Hoff, 118 Ind. 263.

On the face of the pleadings as they stood at the trial, no question of estoppel was in issue, unless the defense of estoppel was permissible under the general denial. But, as we have stated, the issue of estoppel was as fully tried as if it were admissible under the general denial, and as if it were specially pleaded; and an instruction as to the burden of proof of an estoppel was applicable to the situation actually existing at the trial and to the issue actually presented to the jury.

Under these circumstances, there was no error in giving instructions Nos. 5 and 6. Price vs. Hallett, 138 Mo. 561 (s. c. S. W. 450); McDonnell vs. De Soto Sav. & Bldg. Assn. 75 S. W. 438.

227 Appellant claims that the court erred in refusing to give its tendered instruction No. 16, which, after quoting the statute, states that if the jury should find from the evidence there was a contract of suretyship between the plaintiff and her husband, but that the defendant was not a party to this contract, the jury should find for the defendant.

Assuming for the purpose of the statement that this tendered instruction correctly states the law, the substance of the same is fully covered by Appellant's instructions 12 and 14, which were given by the Court, No. 12 stating that it is not enough for the plaintiff to show that as between herself and her husband she is surety, but she must show that the defendant either contracted with her as surety, or that the circumstances were such as to charge the defendant with knowledge of such fact; and No. 14 stating that the plaintiff must show that she entered into a contract of suretyship with defendant, and that the defendant had knowledge of the fact that her connection with the contract was in the nature of a suretyship.

Neither of these instructions tendered or given correctly states the law, each being more favorable than Appellant was entitled to, because in so far as these instructions state that there must exist a contract of suretyship between plaintiff and defendant, they are at least misleading. The fact that the plaintiff is a married woman and that her property is pledged for a debt of her husband creates a relation of suretyship on her part which is binding on defendant, unless defendant shows that she is estopped to assert such suretyship, and if defendant were a party to the contract of suretyship, an estoppel could not exist. She need show nothing in the first instance as to knowledge by the defendant of her suretyship. International, etc. Ass'n vs. Watson, 158 Ind. 508.

The burden is on the defendant to show an estoppel, and this includes defendant's lack of knowledge or opportunity; and if defendant introduces evidence tending to show an estoppel, then for the

first time plaintiff is called upon, in rebuttal, to show that defendant knew, or should have known.

Appellant claims error in the court's refusal to give its tendered instruction No. 18. In so far as this instruction is proper, it
228 is covered by instructions Nos. 3, 15, 19 and 20, given by the court at Appellant's request. Furthermore, this instruction would have stated to the jury that if the jury found "that defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make such a contract, nor can knowledge be imputed to it that the certificate was the property of the plaintiff, and that her husband was pledging her property to secure the payment of his debt."

Much less than actual knowledge would charge the defendant. Circumstances might put the defendant upon inquiry; and if so, the defendant was required to inquire, as a reasonably prudent person would have inquired, and if the defendant failed so to do, knowledge is imputed of all defendant would have learned, and having such knowledge the defendant could not assert estoppel against the plaintiff. Therefore, there was no error in refusing this instruction.

It is sufficient to say of Appellant's assigned error, in the court's refusal to give its tendered instructions Nos. 10, 21, 22, 23 and 24, that they are each fully covered by other instructions given by the court.

The court overruled defendant's objection to the following question propounded to plaintiff's husband as a witness: "At the time you got this certificate from your wife and gave it to Mr. Arnt, did your wife receive anything from the bank for it?" The ground of the objection stated was that the witness would be thus permitted to decide one of the issues in the case. The question called for a fact as to whether the wife had received anything from the bank. Baltes Land, etc. Co. vs. Sutton, 32 Ind. App. 14 (op. 20).

Appellant complains of the ruling permitting the plaintiff to state as a witness what her husband said to her at the time he applied for and she signed and delivered the certificate to him; in substance, that he wanted the certificate to use as security for a loan at the Citizens Bank, and what he said at the time he returned to her with the certificate and she re-signed it at the place indicated by defendant's cashier; in substance, that she "had not signed it in the right place;" and the Appellant further complaint of the refusal
229 of the court to strike out some of these items of testimony.

All the alleged errors last above referred to are by Appellant, in its points and argument, treated together, and not separately, and this court passes on them in the same manner.

Plaintiff's husband had testified, and Appellant's cashier afterwards testified, that the cashier had told the husband that it would be better to have the certificate signed on the regular line. This suggestion resulted in the husband's request of his wife that she re-sign the certificate at the point indicated, because she had not signed it in the right place; and under these circumstances Appellant is in

no position to complain that the request was made, or the wife permitted to testify that the request was made.

Furthermore, as all the conversations objected to were a part of the pertinent and material act of the procuring by the husband and the delivery by the wife of the certificate, they were a part of the res gestæ, and not hearsay. Such statements are not received as conclusive, but to assist in determining the true character of the transaction. Creighton vs. Hoppis, 99 Ind. 369, Fox vs. Cox, 20 Ind. App. 61; Baker vs. Baker, 43 Ind. App. 26.

They tended to show the intent of the wife in doing the act, and while she was in possession, and that there was no real change of ownership. McConnell vs. Hanna, 96 Ind. 105.

It is not clear that plaintiff may not show a contract between herself and her husband, though made in the absence of the Appellant. Hogue vs. McClintock, 76 Ind. 205 (op. 209).

Another ground of objection to several of the above items is that the plaintiff should not be permitted to deny the purpose and meaning of her written power of attorney and assignment of the stock. The form of the wife's signed instruments in such cases does not prevent her from showing the real fact and the actual substance, subject to the grantee's right to show estoppel. Much more positive and expressive is a signed and delivered deed of conveyance, and yet the same may be shown to be a mortgage. Creighton vs. Hoppis, supra; Webb vs. John Hancock Insurance Co. 162 Ind. 616.

230 Therefore, the rule that, under the construction by the Federal Courts of the Federal National Bank Act, an assignment of a certificate of National Bank stock without transfer on the books of the banking corporation is a complete transfer, vesting title in the transferee, is not in point. Even though the transfer had been made on the bank's books, the plaintiff might, inasmuch as substance and not form is regarded, show that the certificate was her property, and the completeness of the transfer, whether by assignment only or by an entry on the books of the corporation, would be pertinent only to the issue of estoppel. Where, upon all the facts being shown, it appears that the wife has absolutely and completely parted with her title by an executed arrangement, and that nothing remains in her contingent upon her husband paying his debts, her conveyance or assignment will be binding upon her, though the purpose of so doing was the actual paying of her husband's debts. Rogers vs. Shewmaker, 27 Ind. App. 631.

It will be noted in the case last above cited, and relied upon by Appellant, that the wife not only completely and without contingency or condition parted with her title at the time she executed the conveyance in question, but that the property had been actually used for the payment of her husband's debts, and that quite a number of years had elapsed before she sought to set aside the conveyance.

But where the fact is that the wife simply pledges her property to be used or returned, or released, contingent upon the default or payment by her husband of his debts, the arrangement is not an absolute or complete parting with her title, though the face of the

papers signed by her may so indicate. McCoy vs. Barnes, 136 Ind. 378.

Therefore there was no error in overruling Appellant's objections, so far as the last stated ground of objection is concerned.

The remaining assignment of error, in overruling the motion for a new trial, is that the verdict of the jury is not sustained by sufficient evidence. No point on this assignment is made in Appellant's brief. The record discloses, however, very little dispute as to any material fact, except as to whether defendant was informed by plaintiff's husband before he procured and pledged the stock that the stock belonged to his wife. There was evidence that the defendant was so informed, and this was denied by Appellant's cashier. There was
231–32 sufficient evidence, pro and con, to raise an issue of fact, and this issue was settled by the jury in favor of the plaintiff. Under the well settled rule this court cannot reverse the judgment on this assignment. Boland vs. Claudell, 181 Ind. 295 (op. 298); Cleveland, etc. R. Co. vs. Simpson, 182 Ind. 693.

Finding no error in the record, the judgment of the court below is affirmed.

233 In the Appellate Court of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

Be it remembered, that on to-wit: the 12th day of April, 1917, said Appellant filed in the office of the Clerk of said Court, its Petition for a Rehearing in said cause, which is in the words and figures following:

234 STATE OF INDIANA:

In the Supreme Court.

No. 22832.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

Appeal from St. Joseph Superior Court.

Appellant's Petition for Rehearing.

Drummond & Drummond, Cornelius R. Collins, Jeremiah B. Collins, Attorneys for Appellant.

235 STATE OF INDIANA:

In the Supreme Court.

No. 22832.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

Appellant's Petition for Rehearing.

The Appellant, Citizens Bank of Michigan City, Indiana, in the above entitled cause, most respectfully petitions the court for a rehearing in the above entitled cause, for each of the following several reasons:

236 First. The Court erred in its holding that the error of the trial court in sustaining the demurrer to appellant's amended second paragraph of answer, in estoppel, was harmless.

Second. The Court erred in its holding that there was no error in the ruling of the trial court in sustaining the demurrer to appellant's amended second paragraph of answer.

Third. The court erred in its holding that justice to appellant does not require that this court determine the sufficiency of the said amended second paragraph of answer.

Fourth. The court erred in its holding that because the record does not disclose that any offered evidence bearing upon an estoppel was excluded, such fact tended to show that no harm was done the appellant by reason of the trial court's order in sustaining the demurrer to the appellant's amended second paragraph of answer in estoppel.

Fifth. The court erred in its holding that there was no error in overruling appellant's motion for a new trial, and specially in the following several particular-:

(*a*) The court erred in holding that there was no error in the trial court giving the instruction Number 5.

237 (*b*) The court erred in holding that there was no error in the trial court giving the instruction Number 6.

(*c*) The court erred in holding that there was no error in the refusal of the trial court to give the instruction Number 18 requested by defendant.

(*d*) The Court erred in holding that there was no error in the refusal of the trial court to give the instruction Number 21, requested by defendant.

(*e*) The court erred in holding that there was no error in the refusal of the trial court to give the instruction Number 22, requested by defendant.

(*f*) The court erred in holding that there was no error in the trial court allowing the plaintiff's husband, Henry Opperman, to

testify to the facts that impeached his title to the stock when he put it up with defendant as collateral.

238 (*g*) The court erred in holding that there was error in allowing plaintiff to testify to statements alleged to have been made by Mr. Arnt to her husband.

(*h*) The court erred in holding that the construction by the Federal Courts of the Federal National Banking Act, as to the assignment of a certificate of National Bank Stock is not controlling on such proposition.

(*i*) The court erred in holding that there was no error in the trial court permitting plaintiff to deny the purpose and meaning of her written power of attorney and assignment of the stock.

(*j*) The court erred in holding that the verdict of the jury is sustained by sufficient evidence.

239 Wherefore the said appellant prays that it be granted a rehearing of the said cause; and that upon said rehearing the judgment of the trial court be reversed and for all other and proper orders in the premises.

CHARLES P. DRUMMOND,
DONALD P. DRUMMOND,
CORNELIUS R. COLLINS,
JEREMIAH B. COLLINS,
Attorneys for Appellant.

240 And afterwards, to-wit: On the 12th day of April, 1917, the same being the 118th Judicial Day of the November Term, 1916 of said Supreme Court, the following further proceedings were had in said cause, to-wit:

Comes now the appellant by counsel and files eight (8) printed copies of its petition and briefs for a rehearing in the words and figures following:

241 And afterwards, to-wit: On the 25th day of April, 1917, the same being the 129th Judicial Day of the November Term 1916 of said Supreme Court, the following further proceedings were had in said cause:

Comes now the appellant, by counsel, and files its additional authorities (8) which said additional authorities are in the words and figures following to wit: (H. I.)

242 And afterwards, to-wit on the 18th day of May, 1917, the same being the 149th Judicial Day of the November Term, 1916, of said Supreme Court, the following further pleas and proceedings were had herein:

Come now the parties by counsel, and the Court being sufficiently advised in the premises, overrules the petition for a rehearing heretofore filed herein by the appellant.

243 *Rule No. 22 of the Supreme and Appellate Courts of Indiana.*

22. The brief of appellant shall contain a short and clear statement disclosing:

First. The nature of the action.

Second. What the issues were.

Third. How the issues were decided and what the judgment or decree was.

Fourth. The errors relied upon for reversal.

Fifth. A concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript. If the insufficiency of the evidence to sustain the verdict or finding, in fact or law, is assigned, the statement shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely. The statement will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party in his brief shall make the necessary corrections or additions.

Following this statement, the brief shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them; and in citing cases, the names of parties must be given, with the book and page where reported. No alleged error or point, not contained in this statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for rehearing.

244 *Points and Authorities.*

Error 1.

(*a.*)

All defenses except the mere denial of the facts alleged by the plaintiff shall be specially pleaded.

Huber vs. Pullen, 9 Ind. 273.
Code sections 350 and 361.
Burns R. S. 1908.

(*b.*)

Estoppel in pais is an affirmative defense and must be specially pleaded and cannot be shown under general denial.

Wood vs. Ostram, 29 Ind. 177-186.

(*c.*)

The answer stated a good cause of defense and the demurrer should not have been sustained.

Long vs. Crosson, 119 Ind. 3.
Walker vs. Joseph Dixon Co., 47 N. Y. Equity 147.
Kelley vs. Fish, 110 Ind. 552-554.
Cowdry vs. Vandenburgh, 101 U. S. 572.
Stephenson vs. Clayton, 14 Ind. App. 76.
Morgan vs. Hoadley, 156 Ind. 320.
Chaplin vs. Baker, 124 Ind. 356-390.
Calvin vs. Britton, 151 Ind. 1.
Rodgers vs. Shoemaker, 27 Ind. App. 631.
Merchants Nat. Bank vs. Hall, 83 N. Y. 338.
Dando's App., 94 Pa. St. 76.
Souder vs. Columbia Nat. Bank, 156 Pa. St. 374.
Shirk vs. North, 138 Ind. 211.
Nickol vs. Hays, 20 Ind. App. 369.

245 Error 2.

A witness should not be permitted to give his conclusion upon a material issue in the cause. Whether plaintiff "received anything from the bank for it" (the certificate) in a legal sense, considering her written assignment of the certificate, was a mixed question of law and fact, which her husband should not have concluded and decided by his answer. Facts and not inferences and conclusions should be given by the witness.

Citizens Street Railway Company vs. Spahr 7 Ind. App. 23-28.

Errors 3, 4, 5, 6, 7, 8, 9, 10, 11.

A party cannot be bound to his prejudice by conversations had in his absence between his adversary and another; when in aid of the adversary, they become self-serving and hearsay.

Scoby vs. Arminton 5 Ind. 514.
Denman vs. McMahin, 37 Ind. 241.

Error 12.

"A married woman shall be bound by an estoppel in pais like any other person."

No. 7853 Burns R. S. 1908.

(*b.*)

When she clothes another with the legal marks of ownership, and thus enables him to mislead others, she is presumed to know the

consequences of her act and should suffer such consequences. The simplest precepts of honesty and fair dealing impel this conclusion.

See cases under 1 (*c*) supra.

246 Error 13.

The contract of suretyship, to be a contract at all, must have been entered into with some one, and the only one was the bank, else there was none. This follows from the statute itself. Hence this instruction should have been given.

No. 7855 Burns R. S. 1908.

Error 14.

Defendant's instruction 14 should have been given. It embodied the sound principle that when a married woman voluntarily and knowingly gives to her husband all appearances of ownership in a thing assignable and deliverable, and voluntarily and knowingly permits him to induce another to loan him money under the belief that he is the owner she cannot be heard to say that the true facts should have been inquired into by the lender.

Morgan vs. Hoadley, 156 Ind. 320.
Calvin vs. Britton, 151 Ind. 1.
Stephenson vs. Clayton, 14 Ind. App. 76.
Chaplin vs. Baker, 124 Ind. 356-390.

Error 15.

This instruction certainly stated the law, and should have been given.

See authorities under 14, supra, also 1 (*c*) supra.

Errors 16, 17 and 18.

See cases under 24 supra and 1 (*c*) supra.

Errors 19 and 20.

(*a.*)

In a replevin case, when the only answer is a general denial, the burden is on the plaintiff throughout the trial, and the de-
247 fendant has no burden of proof. A party cannot have the burden of a contention (Instruction 5); he must have the burden of an issue. When the court sustained the demurrer to the answer in estoppel, he held either that the answer did not state a

cause of defense or more probably, that matters in estoppel are provable under the general denial.

Aultman vs. Forgey, 10 Ind. App. 397.
Jackson vs. Morgan, 167 Ind. 516-533.
Cobby on Replevin Second Edition, 752-8, 825.
Case vs. Moorman, 25 Ind. App. 293.
Aultman vs. O'Dowd, 75 N. W. 756.
Town vs. Sparks, 23 Neb. 142 (36 N. W. 375.)
Phœnix Iron Works Co. vs. McEvony, 66 N. W. 290.

It was, therefore, error to cast the burden on the defendant as was done by the court's instructions 5 and 6.

Wyle vs. Marionofsky, 88 N. E. 448 (Mass.)

(*b.*)

This is a case of the "devil and the deep sea." The court refused to let defendant assume the burden by an affirmative answer, and put the burden upon it in the trial. Anything which will break down the plaintiff's case under an issue formed by the general denial is admissable, as a rule. And the burden stand- fixed upon the plaintiff, no matter what the contention of defendant is.

Jewett vs. Kilpatrick, 107 Fed. 622.
Combey vs. Lovett, 76 Minn. 277 (79 N. W. 99).
Gallick vs. Bordeaux, 23 Mon. 470 (56 Pac. 961).
Payne vs. McCormick, 11 Okla. 318 (66 Pac. 287).
Harvey vs. Ivory, 35 Wash. 397 (77 Pac. 725).
Verry vs. Small, 82 Mass. (16 Gray) 121.
Phenix Iron Works Co. vs. McEvony, 66 N. W. 290.
248 Street vs. Morgan, 67 Pac. 448 (64 Kan. 85).
Tucker vs. Hyatt, 144 Ind. 639.
Ross vs. Banta, 140 Ind. 120-124.
Gwinnup vs. Shies, 161 Ind. 500.
Hunter vs. Mathis, 40 Ind. 356-359.

(*c.*)

To cast the burden upon the defendant when it was not its legal duty to bear such burden, was imposing upon it a burden which the plaintiff should carry. Such error cannot be said to be harmless, as it goes to the very substance of the trial.

Bishop vs. Lord, 83 Ind. 67.
Myers vs. Binkley, 26 Ind. App. 208.
Kinney vs. Dodge, 101 Ind. 573.
Young vs. Miller, 145 Ind. 652.

(*d.*)

Where the burden rests must be determined from the pleadings. Matters of evidence can have no effect to change the burden of proof as made by the pleadings.

Woodruff vs. Hensley, 26 Ind. App. 592-595.
Boyd vs. Smith, 16 Ind. App. 324.

249 And afterwards, to-wit: On the 13th day of July, 1917, the same being the 41st Judicial Day of the May Term 1917, of said Supreme Court, the following further please and proceedings were had herein:

Comes now the appellant, by counsel, and files in the office of the Clerk of the Supreme Court, its petition for the allowance of a writ of error into the Supreme Court of the United States, said petition being hereto next below attached, and being as follows:

250 *Petition for Writ of Error.*

The Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

To the Honorable Richard K. Erwin, Chief Justice of the Supreme Court of the State of Indiana:

The Petition of the Citizens Bank of Michigan City, Indiana, respectfully shows:

That heretofore, to-wit, upon the 18th day of May, 1917, there was tried in the Supreme Court of the State of Indiana a case in which Mary Opperman was Appellee and your Petitioner was Appellant.

The complaint of the plaintiff in said cause was a complaint in replevin for a certain certificate number 385 for fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana, and for damages in the sum of $1,500 for the detention of said stock, which said complaint is in the following words and figures, to-wit:

Complaint for Replevin.

STATE OF INDIANA,
County of La Porte, ss:

In the La Porte Circuit Court, May Term, 1905.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, INDIANA.

251 The said plaintiff complains of said defendant and says: That she, the said plaintiff, is the owner, and entitled to the possession of one Certificate, No. 385 for fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana, of the face value of fifteen hundred Dollars ($1,500.00) dated August 20th, 1904, issued to and in the name of Mary Opperman, which said certificate is of the value of Twenty five Hundred Dollars ($2,-500.00) and of which the said defendant has possession, without right and unlawfully detains from this plaintiff, to plaintiff's damage in the sum of Fifteen Hundred Dollars ($1,500.00).

Wherefore, plaintiff demands judgment for the possession of said property and Fifteen Hundred Dollars ($1,500.00) for the detention thereof, and for all other proper relief.

OSBORN, McVEY & OSBORN,
Attys. for Plff.

Upon the trial of the said cause your Petitioner set forth and filed therein its Second Paragraph of Answer, which said Answer is in the words and figures as follows, to-wit:

STATE OF INDIANA,
St. Joseph County, ss:

In the St. Joseph Superior Court.

No. 799.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, INDIANA.

Par. II. For a further and second paragraph of answer to plaintiff's complaint herein the defendant alleges that in the month of September, 1904, Henry A. F. Opperman, the husband of
252 the plaintiff, was indebted to the defendant, the Citizens Bank of Michigan City, Indiana, in the sum of Thirty Six

Hundred and Thirty Dollars evidenced by three promissory notes for $2,000, $1,000 and $630 respectively.

That said notes were about to mature and the said defendant bank informed the said Henry A. F. Opperman that payment would be demanded and enforced at the maturity of each note. That to secure an extension of the time for the payment of said notes the said Henry A. F. Opperman delivered to said defendant bank as collateral security for the payment of said notes a certain certificate of stock No. 385 for fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana, as hereinafter set forth. That the said First National Bank of Michigan City, by which said certificate of stock No. 385 was issued, as aforesaid, was at the time said certificate was issued and ever since has continued to be a corporation, organized and doing business under and by virtue of the banking laws of the United States of America. That said certificate was issued to and in the name of the plaintiff herein and prior to the time when said certificate was delivered by the said Opperman to this defendant as aforesaid, and on some date to this defendant unknown, the plaintiff signed in blank the form of assignment and power of attorney printed on the back of said certificate without endorsing thereon any restrictive conditions and delivered the same to her husband, Henry A. F. Opperman, and that at the time when the said certificate was delivered to the defendant by the said Henry A. F. Opperman the printed transfer and power of attorney on the back thereof had been executed by the plaintiff, and that at

253 said time the said Henry A. F. Opperman represented to defendant that he was the owner of said certificate and defendant had no notice or knowledge that plaintiff had or claimed to have any interest in said stock certificate. A copy of the said certificate and the assignment thereof being filed herewith and made a part of this answer and marked Exhibit "A."

That defendant relying upon the fact that the said certificate was properly assigned without restriction, and in the possession of the said Henry A. F. Opperman and having no notice or knowledge of any claims of any interest therein on the part of the plaintiff, accepted said certificate as collateral security to his said notes and in consideration thereof it granted to the said Henry A. F. Opperman the right to renew his said note for $630. for sixty days and to renew his note for $1,000. for thirty days and to renew his note for $2,000. for thirty days and further relying on said stock certificate as security for said notes this defendant allowed said Opperman to again renew said notes from time to time until the Spring of the year 1905 when the said Opperman became wholly insolvent and made an assignment for the benefit of his creditors, and has ever since continued to be and is now insolvent.

That the debt evidenced by said notes is still unpaid except as to the sum of $931 paid by the assignee of said Opperman as a dividend to his creditors from his estate. That said Henry A. F. Opperman is now wholly insolvent and said debt cannot be recovered from him.

That at the time when said stock certificate was placed with de-

fendant as collateral security the said Henry A. F. Opperman executed a collateral agreement, a copy of which is filed herewith and marked Exhibit "B" and made a part hereof and that
254 this defendant never had any other contract of suretyship relating to said stock certificate No. 385, and never had any contract of suretyship of any kind with the plaintiff herein.

Wherefore defendant says that plaintiff should be estopped to set up any claim to said certificate as against it and demands judgement.

(Signed) C. R. & J. B. COLLINS,
DRUMMOND & DRUMMOND,
Deft.'s Attorneys.

EXHIBIT "A."

STATE OF INDIANA:

385.

Capital Stock $125,000.00.
Shares $100.00 each.

First National Bank of Michigan City, Indiana.

This is to certify that Mary Opperman is entitled to fifteen shares of the Capital Stock of the First National Bank of Michigan City, Indiana, subject to the provisions of the National Banking Act, approved June 3rd, A. D. 1864, and amendments thereto. Transferable only on the books of the bank, in person or by attorney on the surrender of this Certificate.

In Witness Whereof, the President and Cashier have hereunto subscribed their names and caused the seal of this Bank to be affixed at Michigan City, Ind., 20th day of August, A. D. 1904.

FIRST NATIONAL BANK OF MICHIGAN CITY, IND.

[SEAL.] WALTER VAIL, *President.*

J. F. KREIDLER, *Cashier.*

255 On the reverse side:

For value received — hereby sell, transfer and assign to —— —— the shares of Stock within mentioned and authorize — to make the necessary transfer on the books of the bank.

Witness — hand and seal this — day of —— 190–.

MARY OPPERMAN.

Witnessed by

—— ——.

EXHIBIT "B."

This is to certify, that the undersigned has deposited with the Citizens Bank of Michigan City, Indiana, the following described personal property, to wit:

Certf. No. 385 Capt. Stock of the First Nat. Bank of Michigan City, to be held by said Bank as collateral security for the payment of any and all sums, however evidenced, whether by promissory note, draft, overdraft or otherwise, whether as maker, indorser or surety now owing or which may hereafter be owing to said Bank by the undersigned, either individually or jointly, or jointly and severally with any other person or persons, to include any and all renewals *or* promissory notes or new promissory notes or other obligations accepted in payment of former obligations.

The said Bank, or its assigns, shall have full power and authority upon the maturity of any obligation secured by said collateral, or at any time, thereafter or before, at its discretion, or in the event of said securities or any of them depreciating in value, to collect, or otherwise convert said securities, or either or any part of
256 them or any substitutes therefore, or any additions thereto, or to sell the same, or any part thereof, at public or private sale, at the discretion of said Bank, without advertising the same or otherwise giving public notice or to the undersigned (and the said bank may become the purchaser at any public sale). The said Bank shall apply the proceeds realized from said Collateral or any part thereof so collected, converted or sold, after the payment of all expenses and attorney's fees attending said collection conversion or sale thereof, to the payment of any obligation secured thereby, with all interest due thereon, and return the overplus, if any, to the undersigned. In case the proceeds of said collection or sale of said collateral security shall not cover the principal, interest and expenses, the undersigned promises to pay the deficiency forthwith; all sales or other disposition of said collateral to be without relief from valuation or appraisement laws.

The undersigned waives all claims or defenses on the ground of lack of diligence of the said bank in making collection of said collateral, or sale, or conversion thereof, and it shall not be bound to so proceed, unless directed in writing so to do by the undersigned.

Dated at Michigan City, this 19th day of Sept. 1904.

H. A. F. OPPERMAN.

Upon the trial of said cause the said plaintiff Mary Opperman demurred to defendant's said Second Paragraph of Answer, under the grounds that the same did not constitute a cause of defense to plaintiff's complaint and to the cause of action stated in the plaintiff's complaint, which said demurrer *are* in the words and figures, to-wit:

257 *Demurrer to 2nd Par. of Ans.*

STATE OF INDIANA.
County of St. Joseph, ss:

St. Joseph Superior Court, May Term, 1912.

MARY OPPERMAN

vs.

CITIZENS BANK OF MICHIGAN CITY, IND.

Comes now the Plaintiff and demurs to defendant's amended second paragraph of answer herein, and for ground of demurrer says, that said paragraph of answer does not state facts sufficient to constitute a cause of defense to plaintiff's complaint and to the cause of action stated in plaintiff's complaint.

OSBORN, McVEY AND OSBORN,
Attys. for Plff.

Which said demurrer was sustained by said court, to which ruling the said defendant excepted and thereafter a jury trial was had, and a verdict was rendered for said plaintiff and thereupon there was a judgment in said case by said court in favor of the said plaintiff and against the said defendant, that the said plaintiff recover of the said defendant the property described in the said complaint, to-wit:

One certificate number 385 for fifteen (15) shares of the capital stock of the First National Bank of Michigan City, Indiana; that said property is of the value of $3,150 and that the defendant lawfully detains the same from the plaintiff and that upon failure of the defendant to deliver up to the plaintiff the said property, the plaintiff will recover of the defendant the sum of $3,150; whereupon the said plaintiff took an appeal to the Supreme Court of the State of Indiana, that being the highest court of law or equity of the said state in which a decision could be had in said case,

258 assigning therein as error the sustaining of the said plaintiff's demurrer to the Amended Second Paragraph of this Petitioner's answer, and for error in overruling this Petitioner's motion for a new trial of said cause.

Your Petitioner shows that said complaint, the said Amended Second Paragraph of Answer filed by this Petitioner, and the said demurrer of said plaintiff to said amended Second Paragraph of Answer raised and presented a Federal question in said case, namely:

1st. That the assignment of stock in banking corporations organized under the laws of the United States is governed by such laws, and the construction given such laws by the Supreme Court of the United States.

2nd. The assignment in blank, endorsed by the owner of the shares, on the back of a certificate of stock representing shares in

a banking corporation, organized under the "National Bank Act" and the delivery of such certificate of stock to the purchaser, vest the legal title of the said stock in the said purchaser.

3rd. A certificate of stock in a banking corporation, organized under the "National Bank Act" is endorsed in blank on the back of the said certificate of stock by the owner and in this condition is delivered by said original owner to a third party and the third party puts the same up as collateral security for a loan, did such acts of the said original owner vest such a title in said third party that could be collateraled and vest title thereto in the party of whom the loan was made and to whom the collateral is delivered.

259 4th. A certificate of stock in a banking corporation organized under the "National Bank Act" is endorsed in blank on the back of the said certificate of stock by the owner; and in this condition is delivered by the owner to a third party; and later by the third party the said certificate of stock is put up with a bank as collateral security to a loan made by the said third party. Did such assignment and delivery to the third party vest any title to the said shares of stock in the said third party and could the said third party put the same up as collateral security with a loaning bank and thereby vest any interest or title in the said shares by reason thereof in the said loaning bank.

5th. Plaintiff in Error claims title to the said certificate of stock under the "National Bank Act," and the decision of the Supreme Court of Indiana is against such title under such act in holding that such an assignment in blank is void and vests no title in assignee or transferee.

And your Petitioner alleged and contended by said Second Paragraph of Amended Answer, and in said case in said State Court, — was a complete defense to the said action, and the sustaining of said Demurrer to the said Second Paragraph of Amended Answer was repugnant to and in violation of the laws of the United States and especially of those Acts of Congress of the United States commonly called the "National Bank Act."

Petitioner further shows that a Federal question was made in said case, to-wit, as hereinbefore set out, and that said judgment of the said Supreme Court of Indiana was repugnant to and in conflict with the laws of the United States and the said "National

260 Banking Act" of its Congress aforesaid and that said judgment of said Supreme Court of Indiana was contrary thereto, and that a decision of said Federal question was necessary to the judgment rendered.

Petitioner further shows that the said judgment of said Supreme Court of Indiana was and is a final judgment in the highest Court of the State of Indiana in which a decision in said suit could or can be had, and in which final judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the said The Citizens Bank of Michigan City, all of which fully appears in the records and proceedings of the case and is specially set forth in the Assignment of Errors which is filed with this Petition.

Wherefore your Petitioner prays for the allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Indiana, to the end that the record in said matter may be removed into the Supreme Court of the United States, and the error complained of by your Petitioner may be examined and corrected and said judgment reversed; that citation be granted and signed; that the bond herewith presented be approved, and that upon compliance with the terms of the statute in such cases made and provided, said bond and Writ of Error may operate as a supersedeas bond and also as a bond for costs and damages on a Writ of Error.

CITIZENS BANK OF MICHIGAN CITY, INDIANA,
By JEREMIAH B. COLLINS,
Its Attorney.

WORTH W. PEPPLE,
CORNELIUS R. COLLINS,
JEREMIAH B. COLLINS,
Attorneys and Counselors for Petitioner.

261 *Assignment of Errors.*

Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Plaintiff in Error,

versus

MARY OPPERMAN, Defendant in Error.

The Plaintiff in Error, the Citizens Bank of Michigan City, Indiana, in this action, in connection with its Petition for Writ of Error, makes the following Assignment of Errors, which it avers occurred upon the trial of the said cause, to-wit:

I. The court erred in holding and deciding that the Second Paragraph of said Plaintiff in Error, the Citizens Bank of Michigan City, Indiana, Answer did not state facts sufficient to constitute a defense to the action of the Defendant in Error.

II. The court erred in sustaining the demurrer of the Defendant in Error to the Second Paragraph of the Answer of the Plaintiff in Error, the cause of demurrer being alleged that said Second Paragraph did not state facts sufficient to constitute a defense to the complaint.

III. That the court erred in the admission of evidence offered by the Defendant in Error, Mary Opperman, in the following instances, to-wit:

262 (1) In the testimony given by Henry A. F. Opperman:—

"At the time that you got this certificate of stock from your wife, did you give her any money or anything else for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:—

"I did not."

(2) In the testimony given by Henry A. F. Opperman:—

"At the time that you got this certificate from your wife and gave it to Mr. Arnt at the Citizens Bank, did your wife receive anything from the Bank for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following word:—

"No."

(3) In the testimony given by Henry A. F. Opperman:—

"Was this money that you borrowed of the Citizens Bank and for which the stock was put up as collateral used or any part of it used to pay any debt of your wife?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:—

"It was not."

(4) In the testimony given by Henry A. F. Opperman:—

"Was this money which you borrowed of the Citizens Bank
263 and for which this stock was put up as collateral used or any part of it used to pay for any property of your wife's or that she bought or that was bought for her?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:—

"It was not."

IV. That the court erred in the admission of evidence offered by the Defendant in Error, Mary Opperman, a witness in her own behalf, in the following instances, to-wit:—

(1) In the testimony given by Mary Opperman:—

"What did he say he wanted with it?"

Which said question was answered by the said plaintiff, Mary Opperman, a witness in her own behalf, in the following words:—

"As security."

(2) In the testimony given by Mary Opperman:—

"What, if anything did he say at that time as to where or with whom he was going to use it as security?"

Which said question was answered by the said Defendant in Error, Mary Opperman, a witness on her own behalf, in the following words:—

"He said he wanted it as security to a loan of some money at the Citizens Bank."

(3) In the testimony given by Mary Opperman:—

"Did he ever, at any time, give you any money or anything else for it?"

264 Which said question was then and there answered by the said Defendant in Error, Mary Opperman, a witness in her own behalf, in the following word:—

"No."

V. The court erred in overruling the motion to strike ou the answer of Mary Opperman, to the following question, to-wit:—

(1) "What did he say he wanted with it?"

And to which question she gave this answer:—
"As security."

VI. The court erred in using the following language in its charge to the jury, to-wit:—

Instruction 5.

The defendant contends that the plaintiff is estopped to claim ownership, and demand possession of the certificate of stock in question, because she signed the certificate of stock, in blank, and delivered said certificate of stock to her husband, Henry F. Opperman, and permitted him to take said certificate to the defendant, and represent to the defendant that he, the said Henry A. F. Opperman, was the owner thereof, which representation the defendant contends, that it, through its cashier, Charles E. Arnt, then believed to be true, and accepted said certificate as security, upon the statement of said Henry F. Opperman, not knowing the same to be false, and not knowing that Mary Opperman owned the certificate of stock in question. The burden of proving the facts constituting this estoppel rests upon the defendant, and before the plaintiff's cause of action can be defeated, because of such estoppel, the defendant must prove by a preponderance of all the evidence in the case that the facts constituting such stoppel existed; that the defendant did not
265 know, or have reason to know that Mary Opperman was the true owner of said certificate of stock at the time it was accepted as security, by the defendant.

VII. The court erred in using the following language in its charge to the jury, to-wit:—

Instruction 6.

The burden is on defendant to establish the facts constituting an estoppel. The elements of such an estoppel are as follows, viz:—

First. That there was a misrepresentation or concealment of material facts;

Second. That the misrepresentation was made with knowledge of the facts;

Third. That the party to whom it was made was ignorant of the truth of the matter;

Fourth. That it was made with the intention that the other party should act upon it; and,

Fifth. That the other party was induced to act upon it to his injury.

VIII. The court erred in refusing to charge the jury, as requested by said defendant, this Plaintiff in Error, in its request number 18, which is as follows, to-wit:—

Instruction 18.

I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right

and legal capacity to sell, assign or give the same to her husband or any other person. And if you find from the evidence that she signed and executed a written assignment of said certificate of stock which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband
266 took the same to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt.

IX. The court erred in refusing to charge the jury, as requested by said Plaintiff in Error in its request number 21, which is as follows, to-wit:—

Instruction 21.

I instruct you as a matter of law that where a married woman places title to property, as in this instance a certificate of stock, in her husband, and the husband places such property in the hands of the defendant bank as collateral for money that he received from the said bank or for renewals of notes for money that he received, and that the bank had no notice of the wife's interest in the certificate of stock, that in that event your verdict should be for the defendant.

X. The court erred in refusing to charge the jury, as requested by said Plaintiff in Error in its request number 22, which is as follows, to-wit:—

Instruction 22.

A married woman cannot claim against the holder of collateral the rights of a surety when her husband had the title to the property that he placed in the hands of the defendant as collateral, and where there is nothing to put the holder of the collateral on notice of the wife's equitable interest in the property.

267 XI. The court erred in adjudging and deciding that, under the construction by the United States Supreme Court of the Federal National Banking Act, an assignment of the certificate of National Bank stock without transfer on the books of the Banking corporation, is a complete transfer, vesting title in the transferee, is not in point. In its holding that plaintiff might, as substance and not form is regarded, show that the certificate was her property.

XII. That the court erred in adjudging and deciding that the Defendant in Error, Mary Opperman, in signing her name to the printed assignment of certificate of the First National Bank, and

thereafter delivering the said certificate of stock so assigned to her husband, Henry A. F. Opperman; and after the said Henry A. F. Opperman had delivered the said certificate of stock to Appellant as collateral security for a loan, that the said Defendant in Error, Mary Opperman, in a suit of replevin for said stock from Plaintiff in Error, could show that she, by the said assignment did not vest legal title to said stock to said Henry A. F. Opperman.

XIII. That the court erred in adjudging and deciding that the execution of the assignment in blank printed on the back of certificate of the First National Bank, and the delivery of the same so endorsed to her husband, did not vest the legal title thereof in said husband Henry A. F. Opperman and the same is repugnant to and in conflict with and in contravention of the laws of the United States, and particularly to Section Twelve of the Act of June 3, 1864, the same being commonly known and designated as The "National Bank Act" in that under the said National Bank Act the endorsement in blank and delivery of the said certificate vested the legal title of the said shares in the said Henry A. F. Opperman, the endorsee.

XIV. That the court erred in adjudging and deciding that the execution, of the assignment in blank on the back of certificate
268 by the Defendant in Error, Mary Opperman, and the delivery of the same so endorsed to Henry A. F. Opperman is repugnant to, and in conflict, and in contravention with the laws of the United States and particularly to Section Twelve of the Act of June 3, 1864, the same being commonly known and designated as The "National Bank Act," in that it deprives this Plaintiff in Error of the right and title to such stock of such a banking corporation when the same is so endorsed in blank.

XV. That the court erred in adjudging and deciding in denying to this Plaintiff in Error the privilege and title under the laws of the United States, and particularly under Section Twelve of the Act of June 3, 1864, which is commonly known and designated as The "National Bank Act" of acquiring and taking as collateral the title of shares of the capital stock of such banking corporations when endorsed in blank.

XVI. That the court erred in adjudging, holding and deciding that when said Defendant in Error executed the said assignment of said stock, and therein authorized the endorsee to make the necessary transfer on the books of the bank, which assignment and authority was printed on the back of the said certificate of stock, did not vest the entire, both equitable and legal, title in the lawful possessor of such certificate.

XVII. That the court erred in rendering judgment for the Defendant in Error because it is in contravention of the National Banking Laws, in this, the court held that the title to the certificate of stock did not pass without it being first transferred on the books of the bank.

269 Wherefore the said Citizens Bank of Michigan City, Indiana, prays that the judgment and decision aforesaid may be reversed, annulled and altogether held for naught, and that it may

be restored to all things which it has lost by the action and because of said judgment and decisions.

WORTH W. PEPPLE,
CORNELIUS R. COLLINS,
JEREMIAH B. COLLINS,
Attorneys and Counselors for Plaintiff in Error.

270 [Endorsed:] Copy. The Supreme Court of the State of Indiana. Citizens Bank of Michigan City, Indiana, Appellant, vs. Mary Opperman, Appellee. Petition for Writ of Error and Assignment of Error-.

271 And afterwards, to-wit: On the 13th day of July, 1917, the same being the 41st Judicial Day of the May Term, 1917, of said Supreme Court, the following further proceedings were had herein:

Comes now the Appellant, by counsel, and files its Assignment of Errors in the said cause, and a copy of said Assignment of Errors was lodged in my office for Appellee. Said Assignment of Errors being in the words and figures following, and being hereto next below attached.

272 *Assignment of Errors.*

Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Plaintiff in Error,

versus

MARY OPPERMAN, Defendant in Error.

The Plaintiff in Error, the Citizens Bank of Michigan City, Indiana, in this action, in connection with its Petition for Writ of Error, makes the following Assignment of Errors, which it avers occur-ed upon the trial of the said cause, to-wit:

I. The court erred in holding and deciding that the Second Paragraph of said Plaintiff in Error, the Citizens Bank of Michigan City, Indiana, Answer did not state facts sufficient to constitute a defense to the action of the Defendant in Error.

II. The court erred in sustaining the demurrer of the Defendant in Error to the Second Paragraph of the Answer of the Plaintiff in Error, the cause of demurrer being alleged that said Second Paragraph did not state facts sufficient to constitute a defense to the complaint.

III. That the court erred in the admission of evidence offered by the Defendant in Error, Mary Opperman, in the following instances, to-wit:

273 (1) In the testimony given by Henry A. F. Opperman: "At the time that you got this certificate of stock from your wife, did you give her any money or anything else for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:

"I did not."

(2) In the testimony given by Henry A. F. Opperman:

"At the time that you got this certificate from your wife and gave it to Mr. Arnt at the Citizens Bank, did your wife receive anything from the Bank for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following word:

"No."

(3) In the testimony given by Henry A. F. Opperman:

"Was this money that you borrowed of the Citizens Bank and for which the stock was put up as collateral used or any part of it used to pay any debt of your wife?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:—

"It was not."

(4) In the testimony given by Henry A. F. Opperman:—

"Was this money which you borrowed of the Citizens Bank and for which this stock was put up as collateral used or any part
274 of it used to pay for any property of your wife's or that she bought or that was bought for her?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:—

"It was not."

IV. That the court erred in the admission of evidence offered by the Defendant in Error, Mary Opperman, a witness in her own behalf, in the following instances, to-wit:—

(1) In the testimony given by Mary Opperman:—

"What did he say he wanted with it?"

Which said question was answered by the said plaintiff, Mary Opperman, a witness in her own behalf, in the following words:—

"As security."

(2) In the testimony given by Mary Opperman:—

"What, if anything did he say at that time as to where or with whom he was going to use it as security?"

Which said question was answered by the said Defendant in Error, Mary Opperman, a witness on her own behalf, in the following words:—

"He said he wanted it as security to a loan of some money at the Citizens Bank."

(3) In the testimony given by Mary Opperman:—

"Did he ever, at any time, give you any money or anything else for it?"

275 Which said question was then and there answered by the said Defendant in Error, Mary Opperman, a witness in her own behalf, in the following word:

"No."

V. The court erred in overruling the motion to strike out the answer of Mary Opperman, to the following question, to-wit:

(1) "What did he say he wanted with it?"
And to which question she gave this answer:
"As security."

VI. The court erred in using the following language in its charge to the jury, to-wit:

Instruction 5.

The defendant contends that the plaintiff is estopped to claim ownership, and demand possession of the certificate of stock in question, because she signed the certificate of stock, in blank, and delivered said certificate of stock to her husband, Henry F. Opperman, and permitted him to take said certificate to the defendant, and represent to the defendant that he, the said Henry A. F. Opperman, was the owner thereof, which representation the defendant contends, that it, through its cashier, Charles E. Arnt, then believed to be true, and accepted said certificate as security, upon the statement of said Henry F. Opperman, not knowing the same to be false, and not knowing that Mary Opperman owned the certificate of stock in question. The burden of proving the facts constituting this estoppel rests upon the defendant, and before the plaintiff's cause of action can be defeated, because of such estoppel, the defendant must prove by a preponderance of all the evidence in the case that the facts constituting such estoppel existed; that
276 the defendant did not know, or have reason to know that Mary Opperman was the true owner of said certificate of stock at the time it was accepted as security, by the defendant.

VII. The court erred in using the following language in its charge to the jury, to-wit:

Instruction 6.

The burden is on defendant to establish the facts constituting an estoppel. The elements of such an estoppel are as follows, viz:
First. That there was a misrepresentation or concealment of material facts;
Second. That the misrepresentation was made with knowledge of the facts;
Third. That the party to whom it was made was ignorant of the truth of the matter;
Fourth. That it was made with the intention that the other party should act upon it; and,
Fifth. That the other party was induced to act upon it to his injury.

VIII. The court erred in refusing to charge the jury, as requested by said defendant, this Plaintiff in Error, in its request number 18, which is as follows, to-wit:

Instruction 18.

I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to her husband or any other person. And if you find from the evidence that she signed and executed a written assignment of said certificate of stock which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband took the same
277 to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt.

IX. The court erred in refusing to charge the jury, as requested by said Plaintiff in Error in its request number 21, which is as follows, to-wit:

Instruction 21.

I instruct you as a matter of law that where a married woman places title to property, as in this instance a certificate of stock, in her husband, and the husband places such property in the hands of the defendant bank as collateral for money that he received from the said bank or for renewals of notes for money that he received, and that the bank had no notice of the wife's interest in the certificate of stock, that in that event your verdict should be for the defendant.

X. The court erred in refusing to charge the jury, as requested by said Plaintiff in Error in its request number 22, which is as follows, to-wit:

Instruction 22.

A married woman cannot claim against the holder of collateral the rights of a surety when her husband had the title to the property that he placed in the hands of the defendant as collateral, and where there is nothing to put the holder of the collateral on notice of the wife's equitable interest in the property.

278 XI. The court erred in adjudging and deciding that, under the construction by the United States Supreme Court of the Federal National Banking Act, an assignment of the certificate of National Bank stock without transfer on the books of the Banking corporation, is a complete transfer, vesting title in the

transferree, is not in point. In its holding that plaintiff might, as substance and not form is regarded, show that the certificate was her property.

XII. That the court erred in adjudging and deciding that the Defendant in Error, Mary Opperman, in signing her name to the printed assignment of certificate of the First National Bank, and thereafter delivering the said certificate of stock so assigned to her husband, Henry A. F. Opperman; and after the said Henry A. F. Opperman had delivered the said certificate of stock to Appellant as collateral security for a loan, that the said Defendant in Error, Mary Opperman, in a suit of replevin for said stock from Plaintiff in Error, could show that she, by the said assignment did not vest legal title to said stock to said Henry A. F. Opperman.

XIII. That the court erred in adjudging and deciding that the execution of the assignment in blank printed on the back of certificate of the First National Bank, and the delivery of the same so endorsed to her husband did not vest the legal title thereof in said husband Henry A. F. Opperman and the same is repugnant to and in conflict with and in contravention of the laws of the United States, and particularly to Section Twelve of the Act of June 3, 1864, the same being commonly known and designated as The "National Bank Act" in that under the said National Bank Act the endorsement in blank and delivery of the said certificate vested the legal title of the said shares in the said Henry A. F. Opperman, the endorsee.

XIV. That the court erred in adjudging and deciding that the execution, of the assignment in blank on the back of certif-
279 icate by the Defendant in Error, Mary Opperman, and the delivery of the same so endorsed to Henry A. F. Opperman is repugnant to, and in conflict, and in contravention with the laws of the United States and particularly to Section Twelve of the Act of June 3, 1864, the same being commonly known and designated as The "National Bank Act," in that it deprives this Plaintiff in Error of the right and title to such stock of such a banking corporation when the same is so endorsed in blank.

XV. That the court erred in adjudging and deciding in denying to this Plaintiff in Error the privilege and title under the laws of the United States, and particularly under Section Twelve of the Act of June 3, 1864, which is commonly known and designated as The "National Bank Act" of acquiring and taking as collateral the title of shares of the capital stock of such banking corporations when endorsed in blank.

XVI. That the court erred in adjudging, holding and deciding that when said Defendant in Error executed the said assignment of said stock, and therein authorized the endorsee to make the necessary transfer on the books of the bank, which assignment and authority was printed on the back of the said certificate of stock, did not vest the entire, both equitable and legal, title in the lawful possessor of such certificate.

XVII. That the court erred in rendering judgment for the Defendant in Error because it is in contravention of the National

Banking Laws, in this, the court held that the title to the certificate of stock did not pass without it being first transferred on the books of the bank.

280 Wherefore the said Citizens Bank of Michigan City, Indiana, prays that the judgment and decision aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it has lost by the action and because of said judgment and decisions.

WORTH W. PEPPLE,
CORNELIUS R. COLLINS,
JEREMIAH B. COLLINS,
Attorneys and Counselors for Plaintiff in Error.

281 *Assignment of Errors.*

Supreme Court of the United States.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Plaintiff in Error,

versus

MARY OPPERMAN, Defendant in Error.

The Plaintiff in Error, the Citizens Bank of Michigan City, Indiana, in this action, in connection with its Petition for Writ of Error, makes the following Assignment or Errors, which it avers occurred upon the trial of the said cause, to-wit:—

I. The court erred in holding and deciding that the Second Paragraph of said Plaintiff in Error, the Citizens Bank of Michigan City, Indiana, Answer did not state facts sufficient to constitute a defense to the action of the Defendant in Error.

II. The court erred in sustaining the demurrer of the Defendant in Error, to the Second Paragraph of the Answer of the Plaintiff in Error, the cause of demurrer being alleged that said Second Paragraph did not state facts sufficient to constitute a defense to the complaint.

III. That the court erred in the admission of evidence offered by the Defendant in Error, Mary Opperman, in the following instances, to-wit:—

282 (1) In the testimony given by Henry A. F. Opperman:—

"At the time that you got this certificate of stock from your wife, did you give her any money or anything else for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:—

"I did not."

(2) In the testimony given by Henry A. F. Opperman:—

"At the time that you got this certificate from your wife and gave it to Mr. Arnt at the Citizens Bank, did your wife receive anything from the Bank for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following word:—

"No."

(3) In the testimony given by Henry A. F. Opperman:—

"Was this money that you borrowed of the Citizens Bank and for which the stock was put up as collateral used or any part of it used to pay any debt of your wife?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:—

"It was not."

(4) In the testimony given by Henry A. F. Opperman:—

"Was this money which you borrowed of the Citizens Bank
283 and for which this stock was put up as collateral used or any part of it used to pay for any property of your wife's or that she bought or that was bought for her?"

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"It was not."

IV. That the court erred in the admission of evidence offered by the Defendant in Error, Mary Opperman, a witness in her own behalf, in the following instances, to-wit:—

(1) In the testimony given by Mary Opperman:—

"What did he say he wanted with it?"

Which said question was answered by the said plaintiff, Mary Opperman, a witness in her own behalf, in the following words:—

"As security."

(2) In the testimony given by Mary Opperman:—

"What, if anything did he say at that time as to where or with whom he was going to use it as security?"

Which said question was answered by the said Defendant in Error, Mary Opperman, a witness on her own behalf, in the following words:—

"He said he wanted it as security to a loan of some money at the Citizens Bank."

(3) In the testimony given by Mary Opperman:—

"Did he ever, at any time, give you any money or anything else for it?"

284 Which said question was then and there answered by the said Defendant in Error, Mary Opperman, a witness in her own behalf, in the following word:—

"No."

V. The court erred in overruling the motion to strike out the answer of Mary Opperman, to the following question, to-wit:—

(1) "What did he say he wanted with it?"

And to which question she gave this answer:—

"As security."

VI. The court erred in using the following language in its charge to the jury, to-wit:—

Instruction 5.

The defendant contends that the plaintiff is estopped to claim ownership, and demand possession of the certificate of stock in question, because she signed the certificate of stock, in blank, and delivered said certificate of stock to her husband, Henry F. Opperman, and permitted him to take said certificate to the defendant, and represent to the defendant that he, the said Henry A. F. Opperman, was the owner thereof, which representation the defendant contends, that it, through its cashier, Charles E. Arnt, then believed to be true, and accepted said certificate as security, upon the statement of said Henry F. Opperman, not knowing the same to be false, and not knowing that Mary Opperman owned the certificate of stock in question. The burden of proving the facts constituting this estoppel rests upon the defendant, and before the plaintiff's cause of action can be defeated, because of such estoppel, the defendant must prove by a preponderance of all the evidence in the case that the facts constituting such estoppel existed; that the defendant did not
285 know, or have reason to know that Mary Opperman was the true owner of said certificate of stock at the time it was accepted as security, by the defendant.

VII. The court erred in using the following language in its charge to the jury, to-wit:—

Instruction 6.

The burden is on defendant to establish the facts constituting an estoppel. The elements of such an estoppel are as follows, viz:—
First. That there was a misrepresentation or concealment of material facts;
Second. That the misrepresentation was made with knowledge of the facts;
Third. That the party to whom it was made was ignorant of the truth of the matter;
Fourth. That it was made with the intention that the other party should act upon it; and,
Fifth. That the other party was induced to act upon it to his injury.

VIII. The court erred in refusing to charge the jury, as requested by said defendant, this Plaintiff in Error, in its request number 18, which is as follows, to-wit:—

Instruction 18.

I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to her husband or any other person. And if you find from the evidence that she signed and ex-

ecuted a written assignment of said certificate of stock which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband took the same to
286 the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt.

IX. The court erred in refusing to charge the jury, as requested by said Plaintiff in Error in its request number 21, which is as follows, to-wit:—

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I instruct you as a matter of law that where a married woman places title to property, as in this instance a certificate of stock, in her husband, and the husband places such property in the hands of the defendant bank as collateral for money that he received from the said bank or for renewals of notes for money that he received, and that the bank had no notice of the wife's interest in the certificate of stock, that in that event your verdict should be for the defendant.

X. The court erred in refusing to charge the jury, as requested by said Plaintiff in Error in its request number 22, which is as follows, to-wit:—

Instruction 22.

A married woman cannot claim against the holder of collateral the rights of a surety when her husband had the title to the property that he placed in the hands of the defendant as collateral, and where there is nothing to put the holder of the collateral on notice of the wife's equitable interest in the property.

287 XI. The court erred in adjudging and deciding that, under the construction by the United States Supreme Court of the Federal National Banking Act, an assignment of the certificate of National Bank stock without transfer on the books of the Banking corporation, is a complete transfer, vesting title in the transferree, is not in point. In its holding that plaintiff might, as substance and not form is regarded, show that the certificate was her property.

XII. That the court erred in adjudging and deciding that the Defendant in Error, Mary Opperman, in signing her name to the printed assignment of certificate of the First National Bank, and thereafter delivering the said certificate of stock so assigned to her husband, Henry A. F. Opperman; and after the said Henry A. F.

Opperman had delivered the said certificate of stock to Appellant as collateral security for a loan, that the said Defendant in Error, Mary Opperman, in a suit of replevin for said stock from Plaintiff in Error, could show that she, by the said assignment did not vest legal title to said stock to said Henry A. F. Opperman.

XIII. That the court erred in adjudging and deciding that the execution of the assignment in blank printed on the back of certificate of the First National Bank, and the delivery of the same so endorsed to her husband did not vest the legal title thereof in said husband Henry A. F. Opperman and the same is repugnant to and in conflict with and in contravention of the laws of the United States, and particularly to Section Twelve of the Act of June 3, 1864, the same being commonly known and designated as The "National Bank Act" in that under the said National Bank Act the endorsement in blank and delivery of the said certificate vested the legal title of the said shares in the said Henry A. F. Opperman, the endorsee.

XIV. That the court erred in adjudging and deciding that the execution, of the assignment in blank on the back of certificate
288 by the Defendant in Error, Mary Opperman, and the delivery of the same so endorsed to Henry A. F. Opperman is repugnant to, and in conflict, and in contravention with the laws of the United States and particularly to Section Twelve of the Act of June 3, 1864, the same being commonly known and designated as The "National Bank Act," in that it deprives this Plaintiff in Error of the right and title to such stock of such a banking corporation when the same is so endorsed in blank.

XV. That the court erred in adjudging and deciding in denying to this Plaintiff in Error the privilege and title under the laws of the United States, and particularly under Section Twelve of the Act of June 3, 1864, which is commonly known and designated as The "National Bank Act" of acquiring and taking as collateral the title of shares of the capital stock of such banking corporations when endorsed in blank.

XVI. That the court erred in adjudging, holding and deciding that when said Defendant in Error executed the said assignment of said stock, and therein authorized the endorsee to make the necessary transfer on the books of the bank, which assignment and authority was printed on the back of the said certificate of stock, did not vest the entire, both equitable and legal, title in the lawful possessor of such certificate.

XVII. That the court erred in rendering judgment for the Defendant in Error because it is in contravention of the National Banking Laws, in this, the court held that the title to the certificate of stock did not pass without it being first transferred on the books of the bank.

289 Wherefore the said Citizens Bank of Michigan City, Indiana, prays that the judgment and decision aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it has lost by the action and because of said judgment and decisions.

WORTH W. PEPPLE,
Attorney and Counselor for Plaintiff in Error.

290 And on the same day the following further pleas and proceedings were had in said Court, in said cause:

Comes now the appellant, by counsel, and files its bond on appeal to the Supreme Court of the United States, in the penal sum of Ten Thousand ($10,000.00) Dollars, which bond is now taken and approved, a copy being hereto next below attached, and being as follows:

291 Filed Jul- 13, 1917. J. Fred France, Clerk.

Bond for Supersedeas.

The Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

Know All Men By These Presents, That We, Citizens Bank of Michigan City, Indiana, as principal, and Charles E. Arnt and Henry A. Schwager as sureties, of the County of La Porte and State of Indiana, are held and firmly bound unto Mary Opperman in the sum of Ten Thousand ($10,000.00) Dollars, lawful money of the United States, to be paid to her and her respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, administrators, and successors, by these presents.

Sealed with our seals and dated this 11th day of July, 1917.

Whereas the above named Citizens Bank of Michigan City, Indiana, has prosecuted a Writ of Error to the Supreme Court of the United States to reverse the judgment of the Supreme Court of Indiana in the above entitled cause.

Now, therefore, the condition of this obligation is such that if the above named Citizens Bank of Michigan City, Indiana, Plaintiff in Error, shall prosecute its said Writ of Error to effect and
292 answer all costs, profits and damages if it shall fail to make good its said plea, then this above obligation shall be void; otherwise to remain in full force and effect.

THE CITIZENS BANK OF MICHIGAN CITY, INDIANA,
By CHARLES E. ARNT,
Its President.

Attest:
ALBERT C. WEILER,
Its Cashier.

CHARLES E. ARNT. [SEAL.]
HENRY A. SCHWAGER. [SEAL.]

Sealed and delivered in the Presence of:

BENJAMIN F. VEAL. [SEAL.]
JEREMIAH B. COLLINS.

Bond Examined and Approved this 13th day of July, 1917.

R. K. ERWIN,
Chief Justice.

STATE OF INDIANA,
County of La Porte, ss:

On this 13th day of July A. D., 1917, personally appeared before me Albert C. Weiler, who, being duly sworn, deposes and says that he is the Cashier of the Citizens Bank of Michigan City, Indiana; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and the said instrument was signed and
293 sealed on behalf of said corporation by the authority of its Board of Directors.

[SEAL.] BENJAMIN F. VEAL,
Notary Public.

My Commission expires, May 18th 1921.

294 And afterwards to-wit: On the same — the following further pleas and proceedings were had in said Court in said cause herein:

Come the appellant, by counsel, and files its order for Allowance of Writ of Error, which said Order is hereto next below attached and being as follows:

295 *Order of Allowance of Writ of Error.*

In the Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

On this 13th day of July, 1917, the application of the Citizens Bank of Michigan City, Indiana, Appellant in this action for a Writ of Error, coming on to be heard, said Appellant being represented by counsel and it appearing to the Court from the Petition filed herein and from the record filed therewith, that its application should be granted, and that the transcript of the record, proceedings and papers, upon which the judgment of the Court was rendered, properly certified, should be sent to the Supreme Court of the United States as prayed, in order that such proceedings may be had as may be just.

Now, therefore it is ordered that the Writ of Error be allowed upon bond being furnished by the said Appellant conditioned according to law in the sum of Ten Thousand ($10,000.00) Dollars, the said

bond to act as a supersedeas bond and also as a bond for costs and damages on this Writ of Error and that the bond is now presented to the Court by the said Petitioner and the same is hereby approved.

296 The said Appellant having executed its bond in said sum as provided by law, the Clerk is hereby directed to stay the mandate of the Supreme Court of the State of Indiana until further order of this Court, and it is further ordered that a true copy of the Record, Assignment of Errors, and all proceedings as directed by the Præcipe in the case in the Supreme Court of Indiana, shall be transmitted to the Supreme Court of the United States, duly certified according to law, in order that said Court may inspect the same and take such action thereon as it deems proper according to law.

RICHARD K. ERWIN,
Chief Justice of the Supreme Court of the State of Indiana.

297 And on the same day the following further pleas and proceedings were had in said Court, in said cause:

Comes now the appellant, by counsel, and files a writ of error from the Supreme Court of the United States, to the said Supreme Court of Indiana, in this cause, said writ of error being hereto next below attached, and being as follows:

298 Filed Jul- 13, 1917. J. Fred France, Clerk.

Writ of Error.

The Supreme Court of the United States.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Plaintiff in Error,

vs.

MARY OPPERMAN, Defendant in Error.

The President of the United States to the Honorable Judges of the Supreme Court of the State of Indiana, Greeting:

Whereas in the record and proceeding and in the rendition of the judgement in the above entitled cause, which is now before you, between the Citizens Bank of Michigan City, Indiana, Plaintiff in Error, and Mary Opperman, Defendant in Error, your Court being the highest Court of said State having jurisdiction of the cause, and there was drawn in question, viz:

In the record and proceedings, as also in the rendition of the judgement, of a plea which is in the said Supreme Court of the State of Indiana, being the highest Court of law or equity in the said State in which a decision could be had in said suit between the Citizens Bank of Michigan City, Indiana and Mary Opperman, wherein was drawn in question an authority exercised under

299 the statute of the United States, known as the "National Bank Act"; and the decision was against an authority exercised under said statute of the United States; or wherein was drawn in question the construction of a statute of the United States, and the decision was against the right, title, privilege or exemption specially set up or claimed under said statute, that is to say, the title to stock in a National Banking Association and which is claimed under the statute of the United States and known as the "National Bank Act," and the decision is against the title especially set up or claimed, by the said Plaintiff in Error, Citizens Bank of Michigan City, Indiana, under such statute; and whereas *there is* manifest error hath happened in said decision, to the great damage of the Citizens Bank of Michigan City, Indiana, Petitioner in Error as by its answer appears, we being willing that error, if any hath been, should be duly corrected.

We command you therefor-, if judgement be given therein, that you send under seal of your Court, the record and proceedings of said cause to the Supreme Court of the United States together with this Writ, within such time as may be necessary in order that you have the same at Washington on the 13th day of August, 1917, that the record may be then inspected by the Supreme Court of the United States to be then and there held in order that justice may be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court, the 13 day of July, in the year of our Lord, 1917.

NOBLE C. BUTLER,
Clerk of the District Court of the United States for the District of Indiana.

Allowed by

RICHARD K. ERWIN,
Chief Justice of the Supreme Court of the State of Indiana.

Filed Jul- 13, 1917. J. Fred France, Clerk.

300 And afterwards, to-wit: On the 13th day of July, 1917, the same being the 41st Judicial Day of the May Term 1917, of said Supreme Court, the following further proceedings were had herein:

Comes now the appellant, by counsel and files herein its citation and service on Appellee in said cause, which said service and citation are in the words and figures following, being hereto next below attached.

301 Filed Jul- 13, 1917. J. Fred France, Clerk.

Citation on Writ of Error.

The Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

UNITED STATES OF AMERICA, *ss:*

To Mary Opperman, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Indiana, wherein said Citizens Bank of Michigan City, Indiana is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgement rendered against the said Plaintiff in Error as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard K. Erwin, Chief Justice of the Supreme Court of the State of Indiana, this 13 day of July,
302 in the year of our Lord, One Thousand Nine Hundred and Seventeen.

RICHARD K. ERWIN,
Chief Justice of the Supreme Court of the State of Indiana.

Filed Jul- 13, 1917. J. Fred France, Clerk.

303 STATE OF INDIANA,
County of La Porte, ss:

On the 14th day of July, A. D., 1917, I served the within and foregoing Citation on Mary Opperman, by handing a copy of the same to her at Number 131 West Second Street, in the City of Michigan, said County and State.

GEORGE L. WEST.

Subscribed and sworn to before me this 14th day of July, 1917.
[NOTARY SEAL.] MATTHEW J. KENEFICK,
Notary Public.

My Commission expires, April 10–1920.

Filed Jul- 21, 1917. J. Fred France, Clerk.

304 And on the same day, the following further pleas and proceedings were had in said Court, in said cause:

Comes now the appellant, by counsel and files an Assignment of Errors in the Supreme Court of the United States, on the writ of error herein said assignment of errors being hereto next below attached, and being as follows:

305 *Assignment of Errors.*

Supreme Court of the United States.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Plaintiff in Error,

versus

MARY OPPERMAN, Defendant in Error.

The Plaintiff in Error, the Citizens Bank of Michigan City, Indiana, in this action, in connection with its Petition for Writ of Error, makes the following Assignment of Errors, which it avers occur-ed upon the trial of the said cause, to-wit:

I. The court erred in holding and deciding that the Second Paragraph of said Plaintiff in Error, the Citizens Bank of Michigan City, Indiana, Answer did not state facts sufficient to constitute a defense to the action of the Defendant in Error.

II. The court erred in sustaining the demurrer of the Defendant in Error, to the Second Paragraph of the Answer of the Plaintiff in Error, the cause of demurrer being alleged that said Second Paragraph did not state facts sufficient to constitute a defense to the complaint.

III. That the court erred in the admission of evidence offered by the Defendant in Error, Mary Opperman, in the following instances, to-wit:

306 (1) In the testimony given by Henry A. F. Opperman:

"At the time that you got this certificate of stock from your wife, did you give her any money or anything else for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:

"I did not."

(2) In the testimony given by Henry A. F. Opperman:

"At the time that you got this certificate from your wife and gave it to Mr. Arnt at the Citizens Bank, did your wife receive anything from the Bank for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following word:

"No."

(3) In the testimony given by Henry A. F. Opperman:

"Was this money that you borrowed of the Citizens Bank and for which the stock was put up as collateral used or any part of it used to pay any debt of your wife?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:

"It was not."

(4) In the testimony given by Henry A. F. Opperman:

"Was this money which you borrowed of the Citizens Bank and for which this stock was put up as collateral used or any part
307 of it used to pay for any property of your wife's or that she bought or that was bought for her?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:

"It was not."

IV. That the court erred in the admission of evidence offered by the Defendant in Error, Mary Opperman, a witness in her own behalf, in the following instances, to-wit:

(1) In the testimony given by Mary Opperman:

"What did he say he wanted with it?"

Which said question was answered by the said plaintiff, Mary Opperman, a witness in her own behalf, in the following words:

"As security."

(2) In the testimony given by Mary Opperman:

"What, if anything did he say at that time as to where or with whom he was going to use it as security?"

Which said question was answered by the said Defendant in Error, Mary Opperman, a witness on her own behalf, in the following words:

"He said he wanted it as security to a loan of some money at the Citizens Bank."

(3) In the testimony given by Mary Opperman:

"Did he ever, at any time, give you any money or anything else for it?"

308 Which said question was then and there answered by the said Defendant in Error, Mary Opperman, a witness in her own behalf, in the following word:

"No."

V. The court erred in overruling the motion to strike out the answer of Mary Opperman, to the following question, to-wit:

(1) "What did he say he wanted with it?"

And to which question she gave this answer:

"As security."

VI. The court erred in using the following language in its charge to the jury, to-wit:

Instruction 5.

The defendant contends that the plaintiff is estopped to claim ownership, and demand possession of the certificate of stock in question, because she signed the certificate of stock, in blank, and delivered said certificate of stock to her husband, Henry F. Opperman, and permitted him to take said certificate to the defendant, and represent to the defendant that he, the said Henry A. F. Opperman, was the owner thereof, which representation the defendant contends, that it, through its cashier, Charles E. Arnt, then believed to be true, and accepted said certificate as security, upon the statement

of said Henry F. Opperman, not knowing the same to be false, and not knowing that Mary Opperman owned the certificate of stock in question. The burden of proving the facts constituting this estoppel rests upon the defendant, and before the plaintiff's cause of action can be defeated, because of such estoppel, the defendant must prove by a preponderance of all the evidence in the case that the facts constituting such stoppel existed; that the defendant did not
309 know, or have reason to know that Mary Opperman was the true owner of said certificate of stock at the time it was accepted as security, by the defendant.

VII. The court erred in using the following language in its charge to the jury, to-wit:

Instruction 6.

The burden is on defendant to establish the facts constituting an estoppel. The elements of such an estoppel are as follows, viz:
First. That there was a misrepresentation or concealment of material facts;
Second. That the misrepresentation was made with knowledge of the facts,
Third. That the party to whom it was made was ignorant of the truth of the matter;
Fourth. That it was made with the intention that the other party should act upon it; and,
Fifth. That the other party was induced to act upon it to his injury.

VIII. The court erred in refusing to charge the jury, as requested by said defendant, this Plaintiff in Error, in its request number 18, which is as follows, to-wit:

Instruction 18.

I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to her husband or any other person. And if you find from the evidence that she signed and executed a written assignment of said certificate of stock which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband took
310 the same to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt.

IX. The court erred in refusing to charge the jury, as requested by said Plaintiff in Error in its request number 21, which is as follows, to-wit:

Instruction 21.

I instruct you as a matter of law that where a married woman places title to property, as in this instance a certificate of stock, in her husband, and the husband places such property in the hands of the defendant bank as collateral for money that he received from the said bank or for renewals of notes for money that he received, and that the bank had no notice of the wife's interest in the certificate of stock, that in that event your verdict should be for the defendant.

X. The court erred in refusing to charge the jury, as requested by said Plaintiff in Error in its request number 22, which is as follows, to-wit:

Instruction 22.

A married woman cannot claim against the holder of collateral the rights of a surety when her husband had the title to the property that he placed in the hands of the defendant as collateral, and where there is nothing to put the holder of the collateral on notice of the wife's equitable interest in the property.

311 XI. The court erred in adjudging and deciding that, under the construction by the United States Supreme Court of the Federal National Banking Act, an assignment of the certificate of National Bank stock without transfer on the books of the Banking corporation, is a complete transfer, vesting title in the transferee, is not in point. In its holding that plaintiff might, as substance and not form is regarded, show that the certificate was her property.

XII. That the court erred in adjudging and deciding that the Defendant in Error, Mary Opperman, in signing her name to the printed assignment of certificate of the First National Bank, and thereafter delivering the said certificate of stock so assigned to her husband, Henry A. F. Opperman; and after the said Henry A. F. Opperman had delivered the said certificate of stock to Appellant as collateral security for a loan, that the said Defendant in Error, Mary Opperman, in a suit of replevin for said stock from Plaintiff in Error, could show that she, by the said assignment did not vest legal title to said stock to said Henry A. F. Opperman.

XIII. That the court erred in adjudging and deciding that the execution of the assignment in blank printed on the back of certificate of the First National Bank, and the delivery of the same so endorsed to her husband did not vest the legal title thereof in said husband Henry A. F. Opperman and the same is repugnant to and in conflict with and in contravention of the laws of the United States, and particularly to Section Twelve of the Act of June 3, 1864, the same being commonly known and designated as The "National

Bank Act" in that under the said National Bank Act the endorsement in blank and delivery of the said certificate vested the legal title of the said shares in the said Henry A. F. Opperman, the endorsee.

XIV. That the court erred in adjudging and deciding that the execution, of the assignment in blank on the back of cer-
311½ tificate by the Defendant in Error, Mary Opperman, and the delivery of the same so endorsed to Henry A. F. Opperman is repugnant to, and in conflict, and in contravention with the laws of the United States and particularly to Section Twelve of the Act of June 3, 1864, the same being commonly known and designated as The "National Bank Act," in that it deprives this Plaintiff in Error of the right and title to such stock of such a banking corporation when the same is so endorsed in blank.

XV. That the court erred in adjudging and deciding in denying to this Plaintiff in Error the privilege and title under the laws of the United States, and particularly under Section Twelve of the Act of June 3, 1864, which is commonly known and designated as The "National Bank Act" of acquiring and taking as collateral the title of shares of the capital stock of such banking corporations when endorsed in blank.

XVI. That the court erred in adjudging, holding and deciding that when said Defendant in Error executed the said assignment of said stock, and therein authorized the endorsee to make the necessary transfer on the books of the bank, which assignment and authority was printed on the back of the said certificate of stock, did not vest the entire, both equitable and legal, title in the lawful possessor of such certificate.

XVII. That the court erred in rendering judgment for the Defendant in Error because it is in contravention of the National Banking Laws, in this, the court held that the title to the certificate of stock did not pass without it being first transferred on the books of the bank.

312 Wherefore the said Citizens Bank of Michigan City, Indiana, prays that the judgement and decision aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it has lost by the action and because of said judgement and decisions.

WORTH W. PEPPLE,
Attorney and Counselor for Plaintiff in Error.

313 *Assignment of Errors.*

Supreme Court of the United States.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Plaintiff in Error,

versus

MARY OPPERMAN, Defendant in Error.

The Plaintiff in Error, the Citizens Bank of Michigan City, Indiana, in this action, in connection with its Petition for Writ of

Error, makes the following Assignment of Errors, which it avers occur-ed upon the trial of the said cause, to-wit:

I. The court erred in holding and deciding that the Second Paragraph of said Plaintiff in Error, the Citizens Bank of Michigan City, Indiana, Answer did not state facts sufficient to constitute a defense to the action of the Defendant in Error.

II. The court erred in sustaining the demurrer of the Defendant in Error, to the Second Paragraph of the Answer of the Plaintiff in Error, the cause of demurrer being alleged that said Second Paragraph did not state facts sufficient to constitute a defense to the complaint.

III. That the court erred in the admission of evidence offered by the Defendant in Error, Mary Opperman, in the following instances, to-wit:

314 (1) In the testimony given by Henry A. F. Opperman:

"At the time that you got this certificate of stock from your wife, did you give her any money or anything else for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:

"I did not."

(2) In the testimony given by Henry A. F. Opperman:

"At the time that you got this certificate from your wife and gave it to Mr. Arnt at the Citizens Bank, did your wife receive anything from the Bank for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following word:

"No."

(3) In the testimony given by Henry A. F. Opperman:

"Was this money that you borrowed of the Citizens Bank and for which the stock was put up as collateral used or any part of it used to pay any debt of your wife?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:

"It was not."

(4) In the testimony given by Henry A. F. Opperman:

"Was this money which you borrowed of the Citizens Bank and for which this stock was put up as collateral used or any part
315 of it used to pay for any property of your wife's or that she bought or that was bought for her?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:

"It was not."

IV. That the court erred in the admission of evidence offered by the Defendant in Error, Mary Opperman, a witness in her own behalf, in the following instances, to-wit:

(1) In the testimony given by Mary Opperman:

"What did he say he wanted with it?"

Which said question was answered by the said plaintiff, Mary Opperman, a witness in her own behalf, in the following words:

"As security."

(2) In the testimony given by Mary Opperman:

"What, if anything did he say at that time as to where or with whom he was going to use it as security?"

Which said question was answered by the said Defendant in Error, Mary Opperman, a witness on her own behalf, in the following words:

"He said he wanted it as security to a loan of some money at the Citizens Bank."

(3) In the testimony given by Mary Opperman:

"Did he ever, at any time, give you any money or anything else for it?"

316 Which said question was then and there answered by the said Defendant in Error, Mary Opperman, a witness in her own behalf, in the following word:

"No."

V. The court erred in overruling the motion to strike out the answer of Mary Opperman, to the following question, to-wit:

(1) "What did he say he wanted with it?"

And to which question she gave this answer:

"As security."

VI. The court erred in using the following language in its charge to the jury, to-wit:

Instruction 5.

The defendant contends that the plaintiff is estopped to claim ownership, and demand possession of the certificate of stock in question, because she signed the certificate of stock, in blank, and delivered said certificate of stock to her husband, Henry F. Opperman, and permitted him to take said certificate to the defendant, and represent to the defendant that he, the said Henry A. F. Opperman, was the owner thereof, which representation the defendant contends, that it, through its cashier, Charles E. Arnt, then believed to be true, and accepted said certificate as security, upon the statement of said Henry F. Opperman, not knowing the same to be false, and not knowing that Mary Opperman owned the certificate of stock in question. The burden of proving the facts constituting this estoppel rests upon the defendant, and before the plaintiff's cause of action can be defeated, because of such estoppel, the defendant must prove by a preponderance of all the evidence in the case that the facts constituting such estoppel existed; that the

317 defendant did not know, or have reason to know that Mary Opperman was the true owner of said certificate of stock at the time it was accepted as security, by the defendant.

VII. The court erred in using the following language in its charge to the jury, to-wit:

Instruction 6.

The burden is on defendant to establish the facts constituting an estoppel. The elements of such an estoppel are as follows, viz:

First. That there was a misrepresentation or concealment of material facts;

Second. That the misrepresentation was made with knowledge of the facts;

Third. That the party to whom it was made was ignorant of the truth of the matter;

Fourth. That it was made with the intention that the other party should act upon it; and,

Fifth. That the other party was induced to act upon it to his injury.

VIII. The court erred in refusing to charge the jury, as requested by said defendant, this Plaintiff in Error, in its request number 18, which is as follows, to-wit:

Instruction 18.

I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to her husband or any other person. And if you find from the evidence that she signed and executed a written assignment of said certificate of stock which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband took the
318 same to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt.

IX. The court erred in refusing to charge the jury, as requested by said Plaintiff in Error in its request number 21, which is as follows, to-wit:

Instruction 21.

I instruct you as a matter of law that where a married woman places title to property, as in this instance a certificate of stock, in her husband, and the husband places such property in the hands of the defendant bank as collateral for money that he received from the said bank or for renewals of notes for money that he received, and that the bank had no notice of the wife's interest in the certificate of stock, that in that event your verdict should be for the defendant.

X. The court erred in refusing to charge the jury, as requested by said Plaintiff in Error in its request number 22, which is as follows, to-wit:

Instruction 22.

A married woman cannot claim against the holder of collateral the rights of a surety when her husband had the title to the property that he placed in the hands of the defendant as collateral, and where there is nothing to put the holder of the collateral on notice of the wife's equitable interest in the property.

319 XI. The court erred in adjudging and deciding that, under the construction by the United States Supreme Court of the Federal National Banking Act, an assignment of the certificate of National Bank stock without transfer on the books of the Banking corporation, is a complete transfer, vesting title in the transferree, is not in point. In its holding that plaintiff might, as substance and not form is regarded, show that the certificate was her property.

XII. That the court erred in adjudging and deciding that the Defendant in Error, Mary Opperman, in signing her name to the printed assignment of certificate of the First National Bank, and thereafter delivering the said certificate of stock so assigned to her husband, Henry A. F. Opperman; and after the said Henry A. F. Opperman had delivered the said certificate of stock to Appellant as collateral security for a loan, that the said Defendant in Error, Mary Opperman, in a suit of replevin for said stock from Plaintiff in Error, could show that she, by the said assignment did not vest legal title to said stock to said Henry A. F. Opperman.

XIII. That the court erred in adjudging and deciding that the execution of the assignment in blank printed on the back of certificate of the First National Bank, and the delivery of the same so endorsed to her husband did not vest the legal title thereof in said husband Henry A. F. Opperman and the same is repugnant to and in conflict with and in contravention of the laws of the United States, and particularly to Section Twelve of the Act of June 3, 1864, the same being commonly known and designated as The "National Bank Act" in that under the said National Bank Act the endorsement in blank and delivery of the said certificate vested the legal title of the said shares in the said Henry A. F. Opperman, the endorsee.

XIV. That the court erred in adjudging and deciding that the execution, of the assignment in blank on the back of certifi-
320 cate by the Defendant in Error, Mary Opperman, and the delivery of the same so endorsed to Henry A. F. Opperman is repugnant to, and in conflict, and in contravention with the laws of the United States and particularly to Section Twelve of the Act of June 3, 1864, the same being commonly known and designated as The "National Bank Act," in that it deprives this Plaintiff in Error of the right and title to such stock of such a banking corporation when the same is so endorsed in blank.

XV. That the court erred in adjudging and deciding in denying to this Plaintiff in Error the privilege and title under the laws of the United States, and particularly under Section Twelve of the Act of June 3, 1864, which is commonly known and designated as The

"National Bank Act" of acquiring and taking as collateral the title of shares of the capital stock of such banking corporations when endorsed in blank.

XVI. That the court erred in adjudging, holding and deciding that when said Defendant in Error executed the said assignment of said stock, and therein authorized the endorsee to make the necessary transfer on the books of the bank, which assignment and authority was printed on the back of the said certificate of stock, did not vest the entire, both equitable and legal, title in the lawful possessor of such certificate.

XVII. That the court erred in rendering judgement for the Defendant in Error because it is in contravention of the National Banking Laws, in this, the court held that the title to the certificate of stock did not pass without it being first transferred on the books of the bank.

321 Wherefore the said Citizens Bank of Michigan City, Indiana, prays that the judgement and decision aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it has lost by the action and because of said judgement and decision.

WORTH W. PEPPLE,
Attorney and Counselor for
Plaintiff in Error.

322 And afterwards, to-wit: On July 13, 1917, the same being the 41st Judicial Day of the May Term 1917, of said Supreme Court, the following further pleas and proceedings were had in the cause herein:

Comes now the appellant, by counsel, and files herein its præcipe for certain parts of the record in cause No. 22832, Citizens Bank of Michigan City vs. Mary Opperman, which said præcipe is in the words and figures following, being hereto next below attached.

And afterwards, to-wit: on the 21st day of July, 1917, the same being the 48th Judicial Day of the May Term 1917 of said Supreme Court, the following further pleas and proceedings were had in the cause herein:

Comes now the appellant, by counsel, and files herein, its additional præcipe for additional parts of the record in cause No. 22832, Citizens Bank of Michigan City vs. Mary Opperman, which said præcipe is in the words and figures following, being hereto next below attached.

323 *Præcipe.*

The Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

To the Clerk of the said Supreme Court of the State of Indiana:

You are requested to prepare a certified transcript of record, under your hand and seal, to be filed in the Supreme Court of the United States, pursuant to the Writ of Error allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

1. Assignment of Error in the Appellate Court.
2. Entry of filing Complaint in La Porte Circuit Court.
3. The Complaint and Affidavit thereof.
4. Entry of filing Answer.
5. The Answer.
6. Entry of filing Amended Second Paragraph of Answer.
7. Amended Second Paragraph of Answer, with Exhibits.

324 8. Entry of filing Demurrer to the Amended Second Paragraph of Answer.

9. The Demurrer to the Amended Second Paragraph of Answer.
10. Order sustaining the Demurrer to the Amended Second Paragraph of Answer and the Appellant's Exception.
11. Entry of Appellant's request for Written Instructions.
12. Order of the Court's indications of what Instructions it would give to the jury. Exceptions by the Appellant and time given to file Bill of Exceptions.
13. Copy of Instructions Given and Exceptions by the Appellant.
14. Copy of Instructions Tendered by Appellant, and Refusal by the Court, and the Exceptions.
15. Entry of the Verdict.
16. The Verdict.
17. Entry of filing Bill of Exceptions of Instructions Given and Refused.
18. The Bill of Exceptions containing Instructions Given and Refused.
19. Entry of the Motion for New Trial.
20. The Motion for New Trial.
21. Order *of* Overruling Motion for New Trial and Appellant's Exceptions.
22. Entry of the filing of Bill of Exceptions containing the Evidence.
23. (*a*) All of the Testimony given by Henry A. F. Opperman; (*b*) All of the Testimony given by Mary Opperman; (*c*) The stipulation on Page 159 of the Record; (*d*) All the Testimony given

by Charles E. Arnt; (*e*) All of the Testimony given by Walter Vail; (*f*) All the Testimony given by J. Fred Kreidler.

325 24. Entry of the filing of the Transcript in the Appellate Court on August 9th, 1913.

25. Entry of the Submission of the cause.

26. Entry of filing Appellant's Brief.

27. Entry of filing Appellee's Brief.

28. Entry of filing Appellant's Reply Brief.

29. Order *of* Transferring the cause from the Appellate Court to the Supreme Court of Indiana.

30. Order *of* Affirming Judgement in the Superior Court.

31. The Opinion Affirming the Judgement in the Supreme Court.

32. Entry of Appellant's Petition for Rehearing and the Entry of filing Appellant's Brief on its Petition for Rehearing.

33. Entry of the filing of Additional Authorities of the Appellant.

34. Order, and Finding, Denying *of* the Petition of Appellant for a Rehearing.

35. The Petition of Appellant for a Writ of Error from the Supreme Court of the United States.

36. Citation to Appellee Mary Opperman of the allowance of the said Writ of Error.

37. Order *of* Approving of Bond for Supersedeas.

38. Copy of the Writ of Error.

Respectfully,

WORTH W. PEPPLE,
CORNELIUS R. COLLINS,
JEREMIAH B. COLLINS,
Attorneys for Appellant.

326 And afterwards, to-wit: on the 19th day of July, 1917, the following further proceedings were had in the above entitled cause herein:

Comes now the appellant, by counsel, and serves appellee, Mary Opperman, with præcipe and notice of filing præcipe, which said præcipe and notice are in the words and figures following, to-wit: (H. I.)

327 Filed Jul- 21, 1917. J. Fred France, Clerk.

Notice of Filing of an Additional Præcipe.

The Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant.

vs.

MARY OPPERMAN, Appellee.

To the said Mary Opperman, the Appellee:

You are hereby notified that said Appellant, Citizens Bank of Michigan City, Indiana, will on the 19th day of July, 1917, file

with the Clerk of the said Supreme Court of the State of Indiana, an additional præcipe in the following words and figures, to-wit:

328 Filed Jul- 21, 1917. J. Fred France, Clerk.

Additional Præcipe.

The Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

To the Clerk of the said Supreme Court of the State of Indiana:

You are requested to prepare a certified transcript of record, under your hand and seal, to be filed in the Supreme Court of the United States, pursuant to the Writ of Error allowed in the above entitled cause, and to include in such transcript of record the following, in addition to the matters and things set forth in the præcipe heretofore filed in your office, to-wit:

39. Order *of* filing and granting Writ of Error.
40. Bond, copy of.
41. Præcipe for Record (2).
42. Præcipe notice to and service on Appellee.
43. Service of citation on Appellee.
44. Assignment of Error.
45. Order filing Assignment of Error.

329 46. Order showing the lodging in your office of a copy of Assignment of Error for Appellee.

Respectfully,

WORTH W. PEPPLE,
CORNELIUS R. COLLINS,
JEREMIAH B. COLLINS,
Attorneys for Appellant.

330 Should you desire additionals to the transcript in said matter, you will be governed by the laws and rules in relation thereto.

Dated at Michigan City, Indiana, this 18th day of July, 1917.

WORTH W. PEPPLE,
CORNELIUS R. COLLINS,
JEREMIAH B. COLLINS,
Attorneys for Appellant.

STATE OF INDIANA,
County of La Porte, ss:

On the 18th day of July, 1917, I served the within and foregoing notice on Mary Opperman, by handing a copy of the same to her at

Number 131 West Second Street, in the City of Michigan City, said County and State.

GEORGE L. WEST.

Subscribed and sworn to before me this 18th day of July, 1917.
[SEAL.] JAMES P. KENEFICK,
Notary Public.

My Commission expires Mar. 2, 1919.

Filed July 21, 1917. J. Fred France Clerk.

331 *Præcipe of Appellee.*

THE STATE OF INDIANA, *ss:*

In the Supreme Court.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

To the Clerk of the said Supreme Court of the State of Indiana:

You are requested to prepare, and include in the transcript ordered by the appellant and in addition to the parts of the record ordered by the appellant, a certified transcript of the record under your hand and seal to be filed in the Supreme Court of the United States, pursuant to the Writ of Error allowed in the above entitled cause, and to include in such transcript of record, the following and no other papers or exhibits, to-wit:—

1. The judgement in said cause entered in the St. Joseph Superior Court.
2. The interrogatories submitted to the jury and the answers of the jury thereto returned in the St. Joseph Superior Court.
3. The order book entry showing the submission of interrogatories to the jury in the St. Joseph Superior Court.
4. The order book entry showing the return of the answers to interrogatories and interrogatories with the general verdict, by the jury in the St. Joseph Superior Court.

332 5. Rule 22 and Clauses 1, 2, 3, 4, and 5 thereof, of the Supreme and Appellate Courts of Indiana.

6. The "Points" stated in Appellant's Brief.

(They are set out on pages 61 to 65 inclusive).

Dated at South Bend, Indiana this 18th day of July, 1917.

SAMUEL PARKER,
FRANK E. OSBORN,
WILL G. CRABILL,
S. J. CRUMPACKER,
LEE L. OSBORN,
Attorneys for Appellee.

333 *Additional Præcipe of Appellee.*

THE STATE OF INDIANA, *ss:*

In the Supreme Court.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

To the clerk of the said Supreme Court of the State of Indiana:

You are requested to prepare and include in the transcript ordered by the appellant and in addition to the parts for record ordered by the appellant, a certified transcript of the record under your hand and seal to be filed in the Supreme Court of the United States, pursuant to the Writ of Error allowed in the above entitled cause, and to include in such transcript of record, the following and no other papers or exhibits in addition to the matters and things set forth in the præcipe heretofore filed in your office:

1. Copy of all instructions tendered by Appellant and given by the Court.

Respectfully,

SAMUEL PARKER,
FRANK E. OSBORN,
WILL G. CRABILL,
S. J. CRUMPACKER,
LEE L. OSBORN,
Attorneys for Appellee.

Dated at South Bend, Indiana, 7-19-17.

334 Filed Jul- 19, 1917. J. Fred France, Clerk.

Præcipe of Appellee.

THE STATE OF INDIANA, *ss:*

In the Supreme Court.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appel-ant,

vs.

MARY OPPERMAN, Appellee.

To the Clerk of the said Supreme Court of the State of Indiana:

You are requested to prepare, and incude in the transcript ordered by the appellant and in addition to the parts of the record ordered by

the appellant, a certified transcript of the record under your hand and seal to be filed in the Supreme Court of the United States, pursuant to the Writ of Error allowed in the above entitled cause, and to include in such transcript of record, the following and no other papers or exhibits, to-wit:

1. The judgment in said cause entered in the St. Joseph Superior Court.
2. The interrogatories submitted to the jury and the answers of the jury thereto returned in the St. Joseph Superior Court.
3. The order book entry showing the submission of interrogatories to the jury in the St. Joseph Superior Court.
4. The order book entry showing the return of the answers to interrogatories and interrogatories with the general verdict, by the jury in the St. Joseph Superior Court.
5. Rule 22 and Clauses 1, 2, 3, 4, and 5 thereof, of the Supreme and Appellate Courts of Indiana.
6. The "Points" stated in Appellant's brief. (They are set out on pages 61 to 65 inclusive).

335 Dated at South Bend, Indiana, this 18th day of July, 1917.

SAMUEL PARKER,
FRANK E. OSBORN,
WILL G. CRABILL,
S. J. CRUMPACKER,
LEE L. OSBORN,
Attorneys for Appellee.

336 STATE OF INDIANA,
St. Joseph County, ss:

On the 18th day of July 1917, I served the foregoing præcipe on Citizens Bank of Michigan City, Indiana, by depositing a copy thereof in the United States Mail duly stamped and addressed to said Citizens Bank of Michigan City, Indiana at Michigan City, Indiana.

SHEPARD J. CRUMPACKER.

Subscribed and sworn to before me this 18th day of July 1917.

[Seal Notary Public, St. Joseph Co., Ind.]

MILDRED ROSWELL,
Notary Public.

My Commission Expires Jan. 18, 1919.

337 [Endorsed:] No. 22832. State of Indiana. In the Supreme Court. Citizens Bank of Michigan City, Ind. vs. Mary Opperman. Præcipe of Appellee. Anderson, Parker, Crabill & Crumpacker, South Bend, Ind., Attorneys for Appellee. Filed Jul- 19, 1917. J. Fred France, Clerk.

338 *Additional Præcipe of Appellee.*

THE STATE OF INDIANA, *ss:*

In the Supreme Court.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

To the Clerk of the said Supreme Court of the State of Indiana:

You are requested to prepare, and include in the transcript ordered by the appellant and in addition to the parts for record ordered by the appellant, a certified transcript of the record under your hand and seal to be filed in the Supreme Court of the United States, pursuant to the Writ of Error allowed in the above entitled cause, and to include in such transcript of record, the following and no other papers or exhibits in addition to the matters and things set forth in the præcipe heretofore filed in your office:

1. Copy of all instructions tendered by Appellant and given by the Court.

Respectfully,

SAMUEL PARKER,
FRANK E. OSBORN,
WILL G. CRABILL,
S. J. CRUMPACKER,
LEE L. OSBORN,
Attorneys for Appellee.

Dated at South Bend, Indiana, 7/19/17.

Filed Jul- 20, 1917. J. Fred France, Clerk.

339 STATE OF INDIANA,
St. Joseph County, ss:

On the 19th day of July, 1917, I served the foregoing præcipe on Citizens Bank of Michigan City, Indiana, by depositing a copy thereof in the United States mail duly stamped and addressed to said Citizens Bank of Michigan City, Indiana at Michigan City, Indiana.

SHEPARD J. CRUMPACKER.

Subscribed and sworn to before me this 19th day of July, 1917.

[Seal Notary Public, St. Joseph Co., Ind.]

MILDRED ROSWELL,
Notary Public.

My Commission Expires Jan. 18, 1919.

Filed Jul- 20, 1917. J. Fred France, Clerk.

340 [Endorsed:] No. 22832. State of Indiana. In the Supreme Court. Citizens Bank of Michigan City, Indiana, vs. Mary Opperman. Appellee's Additional Præcipe. Anderson, Parker, Crabill & Crumpacker, South Bend, Ind., Attorneys for Appellee.

341 Filed Jul- 21, 1917. J. Fred France, Clerk.

Notice of Filing of an Additional Præcipe.

The Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

To the said Mary Opperman, the Appellee:

You are hereby notified that said Appellant, Citizens Bank of Michigan City, Indiana, will on the 19th day of July, 1917, file with the Clerk of the said Supreme Court of the State of Indiana, an additional præcipe in the following words and figures, to-wit:

342 Filed Jul- 21, 1917. J. Fred France, Clerk.

Additional Præcipe.

The Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

To the Clerk of the said Supreme Court of the State of Indiana:

You are requested to prepare a certified transcript of record, under your hand and seal, to be filed in the Supreme Court of the United States, pursuant to the Writ of Error allowed in the above entitled cause, and to include in such transcript of record the following, in addition to the matters and things set forth in the præcipe heretofore filed in your office, to-wit:

39. Order of filing and granting Writ of Error.
40. Bond, copy of.
41. Præcipe for Record (2).
42. Præcipe notice to and service on Appellee.
43. Service of citation on Appellee.
44. Assignment of Error.
45. Order filing Assignment of Error.

343 46. Order showing the lodging in your office of a copy of Assignment of Error for Appellee.

Restpectfully,

WORTH W. PEPPLE,
CORNELIUS R. COLLINS,
JEREMIAH B. COLLINS,
Attorneys for Appellant.

344 Should you desire additionals to the transcript in said matter, you will be governed by the laws and rules in relation thereto.

Dated at Michigan City, Indiana, this 18th day of July, 1917.

WORTH W. PEPPLE,
CORNELIUS R. COLLINS,
JEREMIAH B. COLLINS,
Attorneys for Appellant.

STATE OF INDIANA,
County of La Porte, ss:

On the 18th day of July, 1917, I served the within and foregoing notice on Mary Opperman, by handing a copy of the same to her at Number 131 West Second Street, in the City of Michigan City, said County and State.

GEORGE L. WEST.

Subscribed and sworn to before me this 18th day of July, 1917.

[SEAL.] JAMES P. KENEFICK,
Notary Public.

My Commission expires Mar. 2, 1919.

Filed July 21, 1917. J. Fred France, Clerk.

345 *Notice of Filing of Præcipe.*

The Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

To the said Mary Opperman, the Appellee:

You are hereby notified that the said Appellant, Citizens Bank of Michigan City, Indiana, will on the 13th day of July, 1917, file with the Clerk of the said Supreme Court of the State of Indiana, a Præcipe in the following words and figures, to-wit:

346 *Præcipe.*

The Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

To the Clerk of the said Supreme Court of the State of Indiana:

You are requested to prepare a certified transcript of record, under your hand and seal, to be filed in the Supreme Court of the United States, pursuant to the Writ of Error allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:—

1. Assignment of Error in the Appellate Court.
2. Entry of Filing Complaint in La Porte Circuit Court.
3. The Complaint and affidavit thereof.
4. Entry of filing Answer.
5. The Answer.
6. Entry of filing Amended Second Paragraph of Answer.
7. Amended Second Paragraph of Answer, with Exhibits.

347 8. Entry of filing Demurrer to the Amended Second Paragraph of Answer.

9. The Demurrer to the Amended Second Paragraph of Answer.
10. Order sustaining the Demurrer to the Amended Second Paragraph of Answer and the Appellant's Exception.
11. Entry of Appellant's request for Written Instructions.
12. Order of the Court's indications of what Instructions it would give to the jury, Exceptions by the Appellant and time given to file Bill of Exceptions.
13. Copy of Instructions Given and Exceptions by the Appellant.
14. Copy of Instructions Tendered by Appellant, and Refusal by the Court, and the Exceptions.
15. Entry of the Verdict.
16. The Verdict.
17. Entry of filing Bill of Exceptions of Instructions Given and Refused.
18. The Bill of Exceptions containing Instructions Given and Refused.
19. Entry of the Motion for New Trial.
20. The Motion for New Trial.
21. Order *of* Overruling Motion for New Trial and Applicant's Exceptions.
22. Entry of the filing of Bill of Exceptions containing the Evidence.
23. (*a*) All of the Testimony given by Henry A. F. Opperman; (*b*) All of the Testimony given by Mary Opperman; (*c*) The stipulation on Page 159 of the Record; (*d*) All the Testimony given

by Charles E. Arnt; (*e*) All of the Testimony given by Walter Vail; (*f*) All the Testimony given by J. Fred Kreidler.

348 24. Entry of the filing of the Transcript in the Appellate Court on August 9th, 1913.

25. Entry of the Submission of the cause.

26. Entry of filing Appellant's Brief.

27. Entry of filing Appellee's Brief.

28. Entry of filing Appellant's Reply Brief.

29. Order *of* Transferring the cause from the Appellate Court to the Supreme Court of Indiana.

30. Order *of* Affirming Judgement in the Supreme Court.

31. The Opinion Affirming the Judgement in the Supreme Court.

32. Entry of Appellant's Petition for re-hearing and the Entry of filing Appellant's Brief on its Petition for Re-hearing.

33. Entry of the filing of Additional Authorities of the Appellant.

34. Order, and Finding, Denying *of* the Petition of Applicant for a Re-hearing.

35. The Petition of Appellant for a Writ of Error from the Supreme Court of the United States.

36. Citation to Appellee Mary Opperman of the allowance of the said Writ of Error.

37. Order *of* Approving of Bond for Supersedeas.

38. Copy of the Writ of Error.

Respectfully,

WORTH W. PEPPLE,
CORNELIUS R. COLLINS,
JEREMIAH B. COLLINS,
Attorneys for Appellant.

349 [Endorsed:] Copy. The Supreme Court of the State of Indiana. Citizens Bank of Michigan City, Indiana, Appellant, vs. Mary Opperman, Appellee. Præcipe.

350 STATE OF INDIANA,
County of La Porte, ss:

On the 14th day of July, A. D., 1917, I served the within and foregoing Citation on Mary Opperman, by handing a copy of the same to her at Number 131 West Second Street, in the City of Michigan, said County, and State.

GEORGE L. WEST.

Subscribed and sworn to before me this 14th day of July, 1917.

MATTHEW J. KENEFICK,
Notary Public.

My Commission expires, April 10, 1920.

351 Supreme Court of the United States.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Plaintiff in Error,

versus

MARY OPPERMAN, Defendant in Error.

Assignment of Errors.

The Plaintiff in Error, the Citizens Bank of Michigan City, Indiana, in this action, in connection with its Petition for Writ of Error, makes the following Assignment of Errors, which it avers occurred upon the trial of the said cause, to-wit:

I. The court erred in holding and deciding that the Second Paragraph of said Plaintiff in Error, the Citizens Bank of Michigan City, Indiana, Answer did not state facts sufficient to constitute a defense to the action of the Defendant in Error.

II. The court erred in sustaining the demurrer of the Defendant in Error, to the Second Paragraph of the Answer of the Plaintiff in Error, the cause of demurrer being alleged that said Second Paragraph did not state facts sufficient to constitute a defense to the complaint.

III. That the court erred in the admission of evidence offered by the Defendant in Error, Mary Opperman, in the following instances, to-wit:

352 (1) In the testimony given by Henry A. F. Opperman:

"At the time that you got this certificate of stock from your wife, did you give her any money or anything else for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:

"I did not."

(2) In the testimony given by Henry A. F. Opperman:

"At the time that you got this certificate from your wife and gave it to Mr. Arnt at the Citizens Bank, did your wife receive anything from the Bank for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following word:

"No."

(3) In the testimony given by Henry A. F. Opperman:

"Was this money that you borrowed of the Citizens Bank and for which the stock was put up as collateral used or any part of it used to pay any debt of your wife?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:

"It was not."

(4) In the testimony given by Henry A. F. Opperman:

"Was this money which you borrowed of the Citizens Bank and for which this stock was put up as collateral used or any part

353 of it used to pay for any property of your wife's or that she bought or that was bought for her?

Which said question was answered by the said witness Henry A. F. Opperman in the following words:

"It was not."

IV. That the court erred in the admission of evidence offered by the Defendant in Error, Mary Opperman, a witness in her own behalf, in the following instances, to-wit:

(1) In the testimony given by Mary Opperman:

"What did he say he wanted with it?"

Which said question was answered by the said plaintiff, Mary Opperman, a witness in her own behalf, in the following words:

"As security."

(2) In the testimony given by Mary Opperman:

"What, if anything did he say at that time as to where or with whom he was going to use it as security?"

Which said question was answered by the said Defendant in Error, Mary Opperman, a witness on her own behalf, in the following words:

"He said he wanted it as security to a loan of some money at the Citizens Bank."

(3) In the testimony given by Mary Opperman:

"Did he ever, at any time, give you any money or anything else for it?"

354 Which said question was then and there answered by the said Defendant in Error, Mary Opperman, a witness in her own behalf, in the following word:

"No."

V. The court erred in overruling the motion to strike out the answer of Mary Opperman, to the following question, to-wit:

(1) "What did he say he wanted with it?"

And to which question she gave this answer:

"As security."

VI. The court erred in using the following language in its charge to the jury, to-wit:

Instruction 5.

The defendant contends that the plaintiff is estopped to claim ownership, and demand possession of the certificate of stock in question, because she signed the certificate of stock, in blank, and delivered said certificate of stock to her husband, Henry F. Opperman, and permitted him to take said certificate to the defendant, and represent to the defendant that he, the said Henry A. F. Opperman, was the owner thereof, which representation the defendant contends, that it, through its cashier, Charles E. Arnt, then believed to be true, and accepted said certificate as security, upon the statement of said Henry F. Opperman, not knowing the same to be false, and not knowing that Mary Opperman owned the certificate of stock in question. The burden of proving the facts constituting this estoppel rests upon the defendant, and before the plaintiff's cause of action can be defeated, because of such estoppel, the defendant must prove by a preponderance of all the evidence

in the case that the facts constituting such estoppel existed; that the defendant did not know, or have reason to know that
355 Mary Opperman was the true owner of said certificate of stock at the time it was accepted as security, by the defendant.

VII. The court erred in using the following language in its charge to the jury, to-wit:

Instruction 6.

The burden is on defendant to establish the facts constituting an estoppel. The elements of such an estoppel are as follows, viz:

First. That there was a misrepresentation or concealment of material facts;

Second. That the misrepresentation was made with knowledge of the facts;

Third. That the party to whom it was made was ignorant of the truth of the matter;

Fourth. That it was made with the intention that the other party should act upon it; and,

Fifth. That the other party was induced to act upon it to his injury.

VIII. The Court erred in refusing to charge the jury, as requested by said defendant, this Plaintiff in Error, in its request number 18, which is as follows, to-wit:

Instruction 18.

I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to her husband or any other person. And if you find from the evidence that she signed and executed a written assignment of said certificate of stock which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband took the
356 same to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt.

IX. The court erred in refusing to charge the jury, as requested by said Plaintiff in Error in its request number 21, which is as follows, to-wit:

Instruction 21.

I instruct you as a matter of law that where a married woman places title to property, as in this instance a certificate of stock, in her husband, and the husband places such property in the hands of the defendant bank as collateral for money that he received from the said bank or for renewals of notes for money that he received, and that the bank had no notice of the wife's interest in the certificate of stock, that in that event your verdict should be for the defendant.

X. The court erred in refusing to charge the jury, as requested by said Plaintiff in Error in its request number 22, which is as follows, to-wit:

Instruction 22.

A married woman cannot claim against the holder of collateral the rights of a surety when her husband had the title to the property that he placed in the hands of the defendant as collateral, and where there is nothing to put the holder of the collateral on notice of the wife's equitable interest in the property.

357 XI. The court erred in adjudging and deciding that, under the construction by the United States Supreme Court of the Federal National Banking Act, an assignment of the certificate of National Bank stock without transfer on the books of the Banking corporation, is a complete transfer, vesting title in the transferree, is not in point. In its holding that plaintiff might, as substance and not form is regarded, show that the certificate was her property.

XII. That the court erred in adjudging and deciding that the Defendant in Error, Mary Opperman, in signing her name to the printed assignment of certificate of the First National Bank, and thereafter delivering the said certificate of stock so assigned to her husband, Henry A. F. Opperman; and after the said Henry A. F. Opperman had delivered the said certificate of stock to Appellant as collateral security for a loan, that the said Defendant in Error, Mary Opperman, in a suit of replevin for said stock from Plaintiff in Error, could show that she, by the said assignment did not vest legal title to said stock to said Henry A. F. Opperman.

XIII. That the court erred in adjudging and deciding that the execution of the assignment in blank printed on the back of certificate of the First National Bank, and the delivery of the same so endorsed to her husband did not vest the legal title thereof in said husband Henry A. F. Opperman and the same is repugnant to and in conflict with and in contravention of the laws of the United States, and particularly to Section Twelve of the Act of June 3, 1864, the same being commonly known and designated as The "Na-

tional Bank Act" in that under the said National Bank Act the endorsement in blank and delivery of the said certificate vested the legal title of the said shares in the said Henry A. F. Opperman, the endorsee.

XIV. That the court erred in adjudging and deciding that the execution, of the assignment in blank on the back of certif-
358 icate by the Defendant in Error, Mary Opperman, and the delivery of the same so endorsed to Henry A. F. Opperman is repugnant to, and in conflict, and in contravention with the laws of the United States and particularly to Section Twelve of the Act of June 3, 1864, the same being commonly known and designated as The "National Bank Act," in that it deprives this Plaintiff in Error of the right and title to such stock of such a banking corporation when the same is so endorsed in blank.

XV. That the court erred in adjudging and deciding in denying to this Plaintiff in Error the privilege and title under the laws of the United States, and particularly under Section Twelve of the Act of June 3, 1864, which is commonly known and designated as The "National Bank Act" of acquiring and taking as collateral the title of shares of the capital stock of such banking corporations when endorsed in blank.

XVI. That the court erred in adjudging, holding and deciding that when said Defendant in Error executed the said assignment of said stock, and therein authorized the endorsee to make the necessary transfer on the books of the bank, which assignment and authority was printed on the back of the said certificate of stock, did not vest the entire, both equitable and legal, title in the lawful possessor of such certificate.

XVII. That the court erred in rendering judgement for the Defendant in Error because it is in contravention of the National Banking Laws, in this, the court held that the title to the certificate of stock did not pass without it being first transferred on the books of the bank.

359 Wherefore the said Citizens Bank of Michigan City, Indiana, prays that the judgement and decision aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it has lost by the action and because of said judgement and decisions.

WORTH W. PEPPLE,

Attorney and Counselor for Plaintiff in Error.

360 Filed Jul- 13, 1917. J. Fred France, Clerk.

Citation on Writ of Error.

The Supreme Court of the State of Indiana.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Appellant,

vs.

MARY OPPERMAN, Appellee.

UNITED STATES OF AMERICA, *ss:*

To Mary Opperman, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Indiana, wherein said Citizens Bank of Michigan City, Indiana is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgement rendered against the said Plaintiff in Error as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard K. Erwin, Chief Justice of the Supreme Court of the State of Indiana, this 13 day of July,
361 in the year of our Lord, One Thousand Nine Hundred and Seventeen.

RICHARD K. ERWIN,
Chief Justice of the Supreme Court of the State of Indiana.

Filed Jul- 13, 1917. J. Fred France, Clerk.

362 STATE OF INDIANA,
County of La Porte, ss:

On the 14th day of July, A. D., 1917, I served the within and foregoing Citation on Mary Opperman, by handing a copy of the same to her at Number 131 West Second Street, in the City of Michigan, said County and State.

GEORGE L. WEST.

Subscribed and sworn to before me this 14th day of July, 1917.

[Seal Notary Public, Indiana.]

MATTHEW J. KENEFICK,
Notary Public.

My Commission expires April 10, 1920.

Filed Jul- 13, 1917. J. Fred France, Clerk.

363 [Endorsed:] The Supreme Court of the State of Indiana. Citizens Bank of Michigan City, Indiana, Appellant, vs. Mary Opperman, Appellee. Citation on Writ of Error.

364 Filed Jul- 13, 1917. J. Fred France, Clerk.

Writ of Error.

The Supreme Court of the United States.

CITIZENS BANK OF MICHIGAN CITY, INDIANA, Plaintiff in Error,

vs.

MARY OPPERMAN, Defendant in Error.

The President of the United States to the Honorable Judges of the Supreme Court of the State of Indiana, Greeting:

Whereas in the record and proceeding and in the rendition of the judgement in the above entitled cause, which is now before you, between the Citizens Bank of Michigan City, Indiana, Plaintiff in Error, and Mary Opperman, Defendant in Error, your Court being the highest Court of said State having jurisdiction of the cause, and there was drawn in question, viz:—

In the record and proceedings, as also in the rendition of the judgement, of a plea which is in the said Supreme Court of the State of Indiana, being the highest Court of law or equity in the said State in which a decision could be had in said suit between the Citizens Bank of Michigan City, Indiana and Mary Opperman, wherein was drawn in question an authority exercised under the statute of
365 the United States, known as the "National Bank Act"; and the decision was against an authority exercised under said statute of the United States; or wherein was drawn in question the construction of a statute of the United States, and the decision was against the right, title, privilege or exemption specially set up or claimed under said statute, that is to say, the title to stock in a National Banking Association and which is claimed under the statute of the United States and known as the "National Bank Act," and the decision is against the title especially set up or claimed, by the said Plaintiff in Error, Citizens Bank of Michigan City, Indiana, under such statute; and whereas *there is* manifest error hath happened in said decision, to the great damage of the Citizens Bank of Michigan City, Indiana, Petitioner in Error as by its answer appears, we being willing that error, if any hath been, should be duly corrected.

We command you therefor-, if judgement be given therein, that you send under seal of your Court, the record and proceedings of said cause to the Supreme Court of the United States together with this Writ, within such time as may be necessary in order that you have the same at Washington on the 13th day of August, 1917, that the record may be then inspected by the Supreme Court of the United States to be then and there held in order that justice may be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court, the 13 day of July, in the year of out Lord, 1917.

[Seal District Court of the United States, District of Indiana.]

NOBLE C. BUTLER,
Clerk of the District Court of the United States for the District of Indiana.

Allowed by:

RICHARD K. ERWIN,
Chief Justice of the Supreme Court of the State of Indiana.

366 [Endorsed:] The Supreme Court of the United States. Citizens Bank of Michigan City, Indiana, Plaintiff in Error, vs. Mary Opperman, Defendant in Error. Writ of Error.

367 UNITED STATES OF AMERICA,
State of Indiana:

In the Supreme Court of the State of Indiana.

In pursuance of the command of the Writ of Error within, I, J. Fred France, Clerk of the Supreme Court of the State of Indiana, herewith transmit a true, full, and correct copy of the record, papers filed, proceedings had and entered into, as the same appear on file and of record in my office, as follows:—

Assignment of Error in the Appellate Court.
Entry of filing Complaint in La Porte Circuit Court.
The Complaint and Affidavit thereof.
Entry of filing Answer.
The Answer.
Entry of filing Amended Second Paragraph of Answer.
Amended Second Paragraph of Answer, with Exhibits.
Entry of filing Demurrer to the Amended Second Paragraph of Answer.
The Demurrer to the Amended Second Paragraph of Answer.
Order sustaining the Demurrer to the Amended Second Paragraph of Answer and the Appellant's Exception.
Entry of Appellant's request for Written Instructions.

367½ Order of the Court's indications of what Instructions it would give to the jury, Exceptions by the Appellant and time given to file Bill of Exceptions.

Copy of Instructions Given and Exceptions by the Appellant.
Copy of Instructions Tendered by Appellant, and Refusal by the Court, and the Exceptions.
Entry of the Verdict.
The Verdict.
Entry of filing Bill of Exceptions of Instructions Given and Refused.
The Bill of Exceptions containing Instructions Given and Refused.

Entry of the Motion for New Trial.
The Motion for New Trial.
Order *of* Overruling Motion for New Trial and Appellant's Exceptions.
Entry of the filing of Bill of Exceptions containing the Evidence.
(*a*) All of the Testimony given by Henry A. F. Opperman; (*b*) All of the Testimony Given by Mary Opperman; (*c*) The stipulation on Page 159 of the Record; (*d*) All the Testimony given by Charles E. Arnt; (*e*) All of the Testimony given by Walter Vail; (*f*) All the Testimony given by J. Fred Kreidler.
Entry of the filing of the Transcript in the Appellate Court on August 9th, 1913.
368 Entry of the Submission of the cause.
Entry of filing Appellant's Brief.
Entry of filing Appellee's Brief.
Entry of filing Appellant's Reply Brief.
Order *of* Transferring the cause from the Appellate Court to the Supreme Court, of Indiana.
Order *of* Affirming Judgement in the Supreme Court.
The Opinion Affirming the Judgement in the Supreme Court.
Entry of Appellant's Petition for Rehearing and the Entry of filing Appellant's Brief on its Petition for Rehearing.
Order, and Finding, Denying *of* the Petition of Appellant for a Rehearing.
The Petition of Appellant for a Writ of Error from the Supreme Court of the United States.
Citation to Appellee Mary Opperman of the allowance of the said Writ of Error.
Order *of* Approving of Bond for Supersedeas.
Copy of the Writ of Error.
Order *of* filing and granting Writ of Error.
Bond, copy of.
Præcipe for Record (2).
Præcipe, notice to and service on Appellee.
Service of citation on Appellee.
Assignment of Error.
Order filing Assignment of Error.
Order showing the lodging in your office of copy of Assignment of Error for Appellee.
369 Copy of all instructions tendered by Appellant and given by the Court.
The judgement in said cause entered in the St. Joseph Superior Court.
The interrogatories submitted to the jury and the answers of the jury thereto returned in the St. Joseph Superior Court.
The Order book entry showing the submission of interrogatories to the jury in the St. Joseph Superior Court.
The order book entry showing the return of the answers to interrogatories and interrogatories with the general verdict, by the jury in the St. Joseph Superior Court.

Rule 22 and Clauses 1, 2, 3, 4, and 5 thereof, of the Supreme and Appellate Courts of Indiana.

The "Points" stated in Appellant's brief. (They are set out on pages 61 to 65 inclusive.)

As required by the two præcipes filed and presented by the said Appellant and the two præcipes filed and presented by the said Appellee, in the case of Citizens Bank of Michigan City, Indiana, Appellant versus Mary Opperman, Appellee, in the Supreme Court of the State of Indiana.

That I have compared the same with the originals, and they are true and correct transcripts therefrom.

That there is annexed to and returned herewith an Assignment of Error, the Citation, with Affidavit of Service on said Defendant in Error, the Writ of Error.

370 In Testimony Whereof I have hereunto set my hand and affixed the seal of the said Supreme Court of the State of Indiana, at the City of Indianapolis, this 2nd day of August, A. D., 1917.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

J. FRED FRANCE,
Clerk of the Supreme Court
of the State of Indiana.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1917.

No. [redacted]234

CITIZENS BANK OF MICHIGAN CITY, INDIANA,
Petitioner,

vs.

MARY OPPERMAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA, UNDER ACT OF CONGRESS OF SEPTEMBER 6TH, 1916, AND THAT THE COURT DIRECT THE COPY OF THE RECORD HERETOFORE FILED IN THIS CAUSE, UNDER A WRIT OF ERROR, BE DEEMED AS A SUFFICIENT RETURN TO THE CERTIORARI.

PETITION FOR WRIT OF CERTIORARI ETC., AND BRIEF IN SUPPORT THEREOF.

WORTH W. PEPPLE,
JEREMIAH B. COLLINS,
COUNSEL FOR PETITIONER.

BARNARD & MILLER PRINT, CHICAGO

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

No. 610. (26,077).

CITIZENS BANK OF MICHIGAN CITY, INDIANA,
Petitioner,

vs.

MARY OPPERMAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA, UNDER ACT OF CONGRESS OF SEPTEMBER 6TH, 1916, AND THAT THE COURT DIRECT THE COPY OF THE RECORD HERETOFORE FILED IN THIS CAUSE, UNDER A WRIT OF ERROR, BE DEEMED AS A SUFFICIENT RETURN TO THE CERTIORARI.

PETITION FOR WRIT OF CERTIORARI ETC., AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Citizens' Bank of Michigan City, Indiana, most respectfully shows to this Honorable Court:

First.

That this action was brought by said respondent in a *nisi prius* court of the State of Indiana, on the 27th day of July, 1905, to replevy a certain certificate of stock in a National Banking Association, organized under the laws of the United States.

(a) The action was commenced by the said respondent by a complaint in replevin, alleging she was the owner and entitled to the possession of such certificate of stock. (Rec., p. 2.)

Second.

To this complaint, the petitioner filed an answer in two paragraphs.

(a) First paragraph, in general denial. (R., p. 4.) And

Third.

(a) Amended second paragraph, alleging that Henry A. F. Opperman, the husband of the respondent, was indebted to said bank and delivered the said certificate of said National Bank to this petitioner, as collateral, to certain notes and indebtedness due from the husband to the said petitioner. (R., p. 5.)

(b) That the said First National Bank of Michigan City, Indiana, at the time of the issuance of said certificate of stock and ever since, continued to be a corporation and doing business under and by virtue of the laws of the United States of America.

(c) That said certificate was issued in the name of the respondent.

(d) That she assigned said certificate in blank and delivered it to her said husband; that her assignment and power of attorney endorsed on the said certificate contained no restrictive conditions.

(e) That at the time said respondent delivered the said certificate to her said husband, the printed transfer and power of attorney on the back thereof had been executed by the said respondent.

(f) That the said husband represented to the petitioner that he was the owner of the said certificate and the petitioner had no notice that the respondent had or claimed to have any interest in the said certificate of stock.

(g) The petitioner relying on the fact that said certificate was properly assigned without restriction, and in possession of her husband and having no notice or knowledge of any claim on part of respondent, accepted said certificate as collateral and granted a renewal of said notes, amounting to $3,600, and allowed further renewals of said notes till spring of 1905.

(h) That the said Henry A. F. Opperman, in the spring of 1905, made an assignment for the benefit of his creditors under the laws of Indiana. That at said time he was insolvent and ever since continued and is now insolvent.

(i) That his said notes are due and unpaid and the debt cannot be recovered of him.

(j) That at the time said husband delivered said certificate to petitioner, he executed a collateral note to said petitioner.

(k) The assignment of the certificate of stock executed by respondent is as follows:

For value received ..... hereby sell, transfer and assign to ..... the shares of stock, within mentioned and authorize ..... to make the necessary transfer on the books of the bank.

Witness .... hand and seal this ..... day of ....., 190....

MARY OPPERMAN.

Witnessed by:

MARY OPPERMAN.

(R., p. 8.)

(l) That the petitioner extended the time of the payment of the debts due it by the renewal of notes, with said certificate of stock as collateral to said notes. (R., p. 5.)

Fourth.

(a) The respondent demurred to said amended second paragraph of answer on the ground that it does not state facts sufficient to constitute a cause of defense to plaintiff's complaint and to the cause of action stated in plaintiff's complaint. (R., p. 8.)

(b) This demurrer was sustained by the court, and defendant excepted to such ruling of the court. (R., p. 8.)

And upon said complaint and said general denial, the issues were closed, and cause was submitted to a jury.

(c) This second paragraph directly raised the issue of the federal question of the assignability of stock by endorsement in blank of a banking corporation, organized under the National Banking Laws of the United States.

Fifth.

(a) The said jury returned its verdict, finding for respondent, that she is the owner and entitled to the possession of the said certificate of stock, and that petitioner unlawfully detains the same, and that the value of the property is $3,150. (R., p. 22.)

(b) And a judgment was on January 28, 1913, rendered upon the verdict. (R., p. 29.)

Sixth.

(a) And after a motion for a new trial filed by the said petitioner (R., p. 39) had been overruled, the said petitioner appealed the said case to the Appellate Court of the State of Indiana, and was by the said Appellate Court transferred to the Supreme Court of the State of Indiana, praying for the reversal of the said cause, which said Supreme Court of the State of Indiana affirmed the decision of the said *nisi prius* court. (R., p. 120.)

(b) And that thereafter said petitioner filed a petition for a rehearing in said Supreme Court of the said cause, and that on the 18th day of May, 1917, the said Supreme Court of Indiana overruled the said petition for a rehearing in the said cause. (R., p. 125.)

(c) That the said Supreme Court of the State of Indiana is the highest court of the said state in which a decision could be had, where any title is claimed under any statute of the United States and the decision is either in favor of or against the title especially set up or claimed by either party under such statute.

Seventh.

(a) That a certified copy of the record of said Supreme Court of Indiana is hereby exhibited as a part of this application. (R., pp. 169, 172, 173.)

(b) That said certified copy of said record was filed in this court in this case on the 6th day of August, 1917, as a return to a writ of error of this court.

Eighth.

(a) Your petitioner is advised and believes that the said judgment of the Supreme Court of Indiana, in said cause is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provision in Section 237 of the Judicial Code.

Ninth.

(a) Upon this statement of facts and the said record in the cause, the petitioner submits the following reasons why the judgment of the Supreme Court of Indiana should be reviewed by the Supreme Court of the United States:

1. Because the Supreme Court of Indiana decided, in sustaining the demurrer to the amended second paragraph of answer, did not state a cause of defense for the reason that an assignment of certificate of stock in a national banking corporation before it conveys the legal or absolute title therein must be transferred on the books of the bank; that the title to the said stock was especially set up and claimed under the laws of the United States, being

Section 12 of Act June 3, 1864, said section reads as follows:

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

2. The Supreme Court of the State of Indiana erred in deciding that under the construction by the United States Supreme Court of the Federal National Banking Act, in holding that an assignment of the certificate of National Bank stock with a transfer on the books of the banking corporation, is not in point. In its decision that respondent might as substance, and not form is regarded, show that the certificate was respondent's property.

3. That the Supreme Court of the State of Indiana erred in deciding that the respondent, Mary Opperman, in signing her name to the printed assignment of certificate of the First National Bank, and thereafter delivering the said certificate of stock so assigned to her husband, Henry A. F. Opperman; and after the said Henry A. F. Opperman had delivered the said certificate of stock to petitioner as collateral security for a loan, that the said respondent, Mary Opperman, in a suit of replevin for said stock from petitioner, could show orally that she, by the said assignment, did not vest legal title to said stock to said Henry A. F. Opperman; and show orally that she received no consideration from her husband for said certificate. And that Henry A. F. Opperman

was permitted to show orally that he was not the legal owner of the said certificate of stock.

4. Because the Supreme Court of the State of Indiana erred in deciding that the *nisi prius* court of Indiana did not err when it instructed the jury trying the case, that when the respondent signed her name to the certificate of stock, that she did not convey the title to such stock, and that before her cause of action can be defeated, the petitioner must prove by a preponderance of evidence that the transferee, Henry Opperman, represented to the bank that he was the owner of the said stock and that the said bank believed him, not knowing the statement to be false, and not knowing that the respondent was the owner of stock. That upon these propositions the burden is on the petitioner. And further that if she signed the certificate in blank and gave it to her husband for him to secure his debt, then she was surety.

That the said court erred in refusing to charge the jury that if the respondent signed and executed the assignment on the certificate of stock, which purported to sell the stock and voluntarily placed the stock in the possession of her husband, and the husband put up the stock with the petitioner, and did not disclose that he was not the owner, and the petitioner had no knowledge that he was not the owner, that the petitioner was not required to make inquiry of the capacity of the respondent, nor can knowledge be implied to it.

It also erred in refusing to instruct the jury that where the respondent placed the title of property, and there is nothing to put the proposed purchaser

on guard, such person so placing such title, is estopped from seeking to recover it.

5. Because the Supreme Court of the State of Indiana erred in deciding that the *nisi prius* court of the State of Indiana did not err when it refused to instruct the jury that the transfer of the stock on the books of the bank has no vitality or force; and likewise erred when it refused to instruct the jury that the petitioner had the right to assign or give the stock to her husband.

6. Your petitioner further and finally respectfully submits that all of the grounds, reasons and matters asserted and appearing herein for the granting of this petition are duly authorized, raised and presented by the bill of exceptions, assignment of errors, etc., in due and proper order and place, as appears by a certified copy of the record of the entire case and proceedings here present, and as your petitioner understands will be more carefully and succinctly pointed out in an accompanying brief by petitioner's counsel filed herein and herewith; that your petitioner has not understood that it would be expected in this petition for your petitioner to state all of the facts and propositions in detail that will be relied upon in support of this petition if granted, and that your petitioner has therefore only stated the salient points, positions, reasons and facts upon which this petition is based and founded.

Your petitioner, Citizens' Bank of Michigan City, Indiana, most respectfully further shows to this Honorable Court:

Tenth.

(a) That it presented on the 13th day of July, 1917, its petition for writ of error to the Supreme Court of the State of Indiana, together with its assignment of error, and together with its bond for supersedeas. (R. P., p. 132, 139, 154.)

(b) That an order allowing the said writ of error was made on the same day by the Honorable Richard K. Erwin, the chief justice of the said Supreme Court of the State of Indiana and the said chief justice likewise on the same day approved of the bond for supersedeas, which supersedeas was then and there granted, and thereupon on said day the said writ of error was issued by Noble C. Butler, clerk of the District Court of the United States for the District of Indiana. (R., p. 155.)

(c) A citation on the writ of error was ordered issued on the same said day and such citation was served on the respondent on the 14th day of July, 1917. (R., p. 158.)

(d) That thereafter on the 6th day of August, 1917, your petitioner filed in the office of the clerk of this court a certified copy of the record in the Supreme Court of the State of Indiana, in the said case, as provided in the rules of this court in relation to writs of errors. (R., p. 187.)

That the time for filing of the said record in the clerk's office of this court, the said petitioner deposited with such record the sum of $25 as required by the rules in this court, and did on the 1st day of November, 1917, deposit the sum estimated by the clerk of this court of the cost of printing the record,

his fees for preparing it for the printer and supervising fee, and other pobable fees, the sum of $440, as required by the rules of this court.

(e) That said record has been printed under the supervision of the clerk of this court, as provided in the rules of the court, and the copies thereof are now on file in this cause.

(f) Your petitioner further represents that it aimed to and believes it has taken all the necessary steps as required by the rules of this court and the law for the presentation of said cause for a review in this court on a writ of error.

(g) And that the said cause is pending in this court upon a writ of error.

Eleventh.

(a) The said petitioner further represents and states to this Honorable Court that the preparation of this cause for a review by your Honorable Court was under the charge and care of its attorney, Jeremiah B. Collins, and none other. The said attorney had access to the compiled statutes of 1913, compiled by the West Publishing Company, also access to the Revised Statutes of the United States, Second Edition of 1878, and of Volume 1 of the Supplement to the Revised Statute of the Uinted States of 1874-1891, together with the pamphlet containing the Judicial Code of March 3, 1911, including the amendments to March 4, 1913, printed by the United States of America.

(b) That said attorney made diligent search and inquiry of attorneys who had more or less practice in the Federal Courts as to the statutes in force in re-

lation to the said matter of removing a cause from a State Supreme Court to United States Supreme Court for review with the result that none of them knew anything of the amendment of Section No. 237 of the Code, approved September 6, 1916.

Said attorney is a resident of Michigan City, Indiana, and did not have access to any Federal Statutes other than aforesaid.

(c) In the preparation of the transcript and the proceedings to review in this cause, the said attorney purchased the two volume work of Loveland Forms of Federal Practice, Annotated; and also Bunn's Brief Survey of the Jurisdiction and Courts of the United States; and also the work of Montgomery's Manual of Federal Procedure. These volumes were purchased especially for this case, and none of said volumes contained any mentioning of said amendment of Section 237 of the Code.

(d) That the said attorney prepared the papers from the information and forms taken from the said statutes and works and that none of the said works or statutes mentioned contained any statement of the fact of the amendments of September 6, 1916; that the said attorney did not learn of and had no knowledge of the said amendment of September 6, 1916, until several weeks after October term, 1917, of this Honorable Court, and after filing the transcript of this cause in this court in return to the writ of error.

(e) The said attorney is a subscriber for the Supreme Court Reporter, published by West Publishing Company, and referred to such reporter in his preparation for the review of this cause. That up

to the time he had filed the transcript in this cause he did not observe any decision indicating to him of the amendments of said September 6, 1916.

(f) This petition is not made for delay merely, but that justice may be done in the premises.

(g) That the said petitioner represents and believes that it has a meritorious defense to the action brought by the said respondent, and a meritorious cause for a review in this court, for the reason herein set forth and that an injustice has been done it and that such injustice is not done through the petitioner's inexcusable neglect. That said petitioner would have prayed for a writ of certiorari at the first instance, had it known or been acquainted with the said amended act of the Judicial Code of September 6, 1916.

Twelfth.

(a) That the said petitioner represents that the said respondent participated by praecipe in the preparation of the transcript filed in this court on the writ of error, and the said respondent appeared in this cause by and through her attorney, the Honorable Samuel Parker, in response to the citation on the said writ of error.

(b) The said petitioner further represents to the said court that the delay made in this application for a writ of certiorari has not resulted in any detriment to the respondent, nor will any injustice result from granting the said writ of certiorari.

(c) That the granting of the writ herein prayed for will not occasion any delay or detriment to the said defendant in error.

(d) That the said defendant in error has made no motion or filed any pleading of any character in said cause.

Thirteenth.

(a) Your petitioner thus respectfully submits that the question of the legal and just construction and effect of the National Banking Acts, involved in and presented by the said case of your petitioner, should be authoritatively and finally adjudged by the Honorable Court upon and above a full presentation to the court of the merits of said question on the part of the petitioner and respondent.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the Superme Court of the State of Indiana, commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Indiana in the said case therein entitled "*Citizens' Bank of Michigan City, Indiana* v. *Mary Opperman*, cause No. 22832," to the end that said cause may be reviewed and determined by this court as provided in Section 237, of the Judicial Code, as amended by Act of Congress, approved September 6, 1916, and when said writ of *certiorari* is so allowed, that this honorable Court order and direct that the copy of the record and the printed copies thereof heretofore filed under the writ of error and the ancillary writ of *certiorari*, should be taken and deemed as a sufficient return to the said writ of *certiorari*, and that your petitioner may have such further or other relief or remedy in

the premises, as to this court may seem appropriate with said act, and that said petitioner be allowed to file briefs on the merits of this cause as if it was originally removed to this court on a writ of *certiorari*, and that the said judgment of the said Supreme Court of the State of Indiana, in said case, and every part thereof, may be reversed by this honorable court with proper directions.

And your petitioner shall ever pray.

CITIZENS' BANK OF MICHIGAN CITY, INDIANA.

By JEREMIAH B. COLLINS,
Attorney and Counsel for Petitioner.

JEREMIAH B. COLLINS,
WORTH W. PEPPLE,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
STATE OF INDIANA,
COUNTY OF LA PORTE. } ss.

Jeremiah B. Collins, being duly sworn on his oath, says that he is one of the attorneys for the petitioner herein, the Citizens' Bank of Michigan City, Indiana; that said petitioner is a corporation; that deponent has read the foregoing petition and that the same is true to the deponent's knowledge, information and belief, and dependent's knowledge is derived from one fact that he has acted for said petitioner in all matters connected with this litigation.

JEREMIAH B. COLLINS.

Subscribed in my presence and sworn to before me this 8th day of March, A. D. 1918.

JAMES P. KENNEFICK,
Notary Public.

My commission expires,
...3.-2.-1919....

We hereby certify that we have examined the foregoing petition and in our opinion the petition is well founded and the case is one in which the prayer of the petition should be granted.

JEREMIAH B. COLLINS,
WORTH W. PEPPLE,
Counsel for the Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, A. D. 1917.

In the matter of the petition of the Citizens' Bank of Michigan City, Indiana, petitioner for a writ of *certiorari*, under Section 237 of the Judicial Code, as amended September 6, 1916, and application that the court direct the copy of the record heretofore filed in this cause, under a writ of error, be deemed as a sufficient return to the *certiorari*.

No. 610.

Citizens' Bank of Michigan City, Indiana,
Petitioner,
vs.
Mary Opperman,
Respondent.

BRIEF ON BEHALF OF PETITIONER.

MAY IT PLEASE THE COURT:

The statement in the matter involved in this petition and the general reasons relied on for the allowance of a writ of *certiorari*, and for the substitution of the record heretofore filed under writ of error, be deemed as a sufficient return to such writ of *certiorari*, we believe are sufficiently set forth in the said petition, but endeavoring to comply with the rules of this honorable court, we submit herewith a concise statement of the matter of the said petition.

I.

Statement of the case in re, petition for a writ of certiorari.

(a)

This was an action of replevin brought by respondent in the state court of the State of Indiana, by a complaint in law in replevin, for the possession of 15 shares of stock in the First National Bank of Michigan City, a corporation organized under the United States national banking laws. (P. R., p. 2.)

(b)

To this complaint the petitioner filed an answer in two paragraphs, first a general denial. (P. R., p. 4.)

Amended second paragraph of answer, that said respondent did, on about September 19, 1904, make an assignment to her husband of a certain certificate of stock in a national banking association, organized under the laws of the United States; that such assignment was made on the blank form on the back of such certificate and was as follows:

> "For value received ..... hereby sell, transfer and assign to ..... the shares of Stock within mentioned and authorize ..... to make the necessary transfer on the books of the bank.
>
> Witness ..... hand and seal this ..... day of ....., 190...
>
> MARY OPPERMAN.
>
> Witnessed by
> MARY OPPERMAN."

The said respondent executed an assignment on the back of such certificate of stock and after so doing delivered it to her husband. Her husband then delivered it to the petitioner as collateral to secure the payment of certain indebtedness due from the husband to the said petitioner. After the husband delivered the said certificate of stock to the said petitioner, the said petitioner then gave to the husband several extensions of time on several notes owed by the husband to the petitioner.

That said assignment so made contained no restrictions whatever.

That thereafter the said Henry Opperman became insolvent, made an assignment, under the laws of Indiana, of all of his property for the benefit of his creditors, and has since and continues to be and remains insolvent and your petitioner cannot make anything in its said claims, the said notes to which the said certificate of stock was so put up as collateral security.

That the said certificate of stock represented stock of said First National Bank; that the same was a corporation organized and doing business under the national banking laws of the United States; that under such laws the said stock was properly assigned and the title thereof vested in the said Henry Opperman, and that the latter had a good legal title thereto, and was able to assign the same as collateral security as aforesaid. (P. R., p. 5.)

(c)

To this amended second paragraph of answer the said respondent filed a demurrer for want of facts,

and which was sustained by the court, to which ruling the petitioner excepted and refused to plead further. (P. R., p. 8.)

(d)

On the issues so formed, by said complaint, and said answer in general denial, the cause was submitted to a jury for trial. (P. R., p. 22.)

(e)

Upon the issues so joined, the case came on for trial before a jury duly empaneled in said *nisi* court.

The respondent, being the plaintiff below, to sustain her issues, examined several witnesses, which several witnesses gave testimony over the objections of this petitioner, in the following manner, to wit:

HENRY A. F. OPPERMAN:

Q. Who, if anybody, gave her any directions as to writing her name on it? (P. R., p. 59 (99)).

The defendant objects to the question upon the ground that the bank is not bound by the talk and directions given by any conversation to Mrs. Opperman in their absence and they have not shown that they were present or that they gave any directions.

The court overrules the objection.

The defendant excepts.

A. I did; or rather I was directed to tell her.

The defendant moves to strike out the answer for the reason that the defendant is not bound by the directions or the talk of the husband of the plaintiff, Mrs. Opperman, such directions and talk having taken place in the absence of the defendant.

The court overrules the motion.

The defendant excepts. (P. R., p. 50.)

Q. Now, Mr. Opperman, at the time you gave this certificate of stock, which I believe is mentioned in this collateral agreement as certificate number 385, did you receive any money from the Citizens Bank?

The defendant objects to the question for the reason it is material for him to deny any specific consideration.

The court overrules the objection.

A. No.

Q. Did your wife receive any money at that time?

A. No, sir. (P. R., p. 53 (104)).

Q. Now, did you get any other money than those items you have mentioned, from the bank?

A. That is all. (P. R., p. 55 (107).)

Q. At the time that you got this certificate of stock from your wife did you give her any money or anything else for it?

The defendant objects to the question for the reason the defendant bank is not bound by the acts or transactions that occurred during his absence nor any secret agreement between the wife and the husband.

The court overrules the objection.

The defendant excepts.

A. I didn't. (P. R., p. 55.)

The defendant moves to strike out the answer for the reason that the bank is not bound by the secret agreements between the witness and his wife, the plaintiff.

The court overrules the motion.

The defendant excepts. (P. R., p. 55.)

Q. At the time that you got this certificate from your wife and gave it to Mr. Arnt at the Citizens Bank did your wife receive anything from the bank for it?

The defendant objects to the question for the reason that this is a question that calls upon the witness to decide one of the legal issues in this case.

The court overrules the objection.

The defendant excepts.

A. No. (P. R., p. 55.)

The defendant moves the court to strike out the answer of the witness for the reason that the answer is the conclusion of the witness and it assumes to decide for the jury one of the facts which the jury must decide from all the facts and circumstances.

The court overrules the motion.

The defendant excepts. (P. R., p. 55.)

Q. Was this money that you borrowed of the Citizens Bank and for which the stock was put up as collateral used, or any part of it used to pay any debt of your wife's?

The defendant objects to the question for the reason he has specifically recited what he did with the money; this is simply cross-examining him on his own statement.

The court overrules the objection.

The defendant excepts.

A. It was not. (P. R., p. 56.)

Q. Was this money which you borrowed of the Citizens Bank and for which this stock was put up as collateral, or any part of it, used to pay for any property of your wife's or that she bought or that was bought for her?

The defendant objects to the question on the ground that this is simply cumulative and cross-examining his own witness; he may ask if she bought any horse with it, any cows, any poultry, any blue sky, or anything else.

The court overrules the objection.

The defendant excepts.

A. It was not. (P. R., p. 56.)

Q. Do you know where your wife got that stock?

The defendant objects to the question as not being material in this case, the question at issue here being the title to the stock.

The court overrules the objection.

The defendant excepts.

A. Yes. (P. R., p. 56.)

(f)

MARY OPPERMAN:

Q. And where was that certificate at that time?

A. Upstairs in the bedroom—my bedroom.

Q. And when he asked you for it did he tell you what he wanted to do with it?

The defendant objects to the question for the reason that the defendant is not bound by the talk and conversation of the plaintiff and her husband in its absence. Second ground: that it is not bound by any

secret agreement entered into by and between the plaintiff and her husband in its absence and without its knowledge.

The court overrules the objection.

The defendant excepts.

A. Yes. (P. R., p. 65.)

Q. What did he say that he wanted with it?

The defendant objects to the question on the ground that it cannot be bound by the talk and conversation between the plaintiff and her husband in its absence.

The court overrules the objection.

The defendant excepts.

A. As security. (P. R., p. 65 (123).)

The defendant moves to strike out the answer for the reason that it does not purport to say what her husband said and for the further reason that the defendant cannot be bound by the talk and conversation of the plaintiff with her husband in its absence; for the reason, second, that the defendant cannot be bound by the secret agreements made and entered into by the plaintiff and her husband in its absence.

The court overrules the objection.

The defendant excepts. (P. R., p. 65.)

Q. What, if anything, did he say at that same time as to where or with whom he was going to use it as security?

The defendant objects to the question upon the ground, first, that the plaintiff here is estopped from denying the purport and meaning of her written power of attorney and assignment of this stock;

second ground, that the defendant is not bound by the conversation called for, had in its absence, between the plaintiff and her husband; and for the reason, third, that the defendant cannot be bound in the circumstances of this case by the secret and undisclosed arrangements or agreements or statements entered into in the absence of the defendant or any of its officers.

The court overrules the objection.

The defendant excepts.

A. Yes, he did. (P. R., p. 66 (125).)

Q. Notice the question, Mrs. Opperman; what, if anything, did he say?

A. He said he wanted it as security to a loan of some money at the Citizens Bank.

The defendant objects and moves to strike out the answer for the reason, first, that the plaintiff is estopped from making that statement by reason of the fact that it appears in evidence that she signed and delivered a written assignment of this bank stock in which was contained a power of attorney to transfer it on the books of the bank; for the reason, second, that the defendant can not be bound by the statement made in its absence and in the absence of any of its officers; and third, that the defendant is not bound by any secret agreement or arrangement or understanding or statement made by the husband of the plaintiff and the plaintiff.

The court overrules the objection.

The defendant excepts. (P. R., p. 66.)

Q. And when he brought it back what did he say to you about the way you had signed it?

The defendant objects to the question, first, on the ground that the plaintiff in this case under the issues here and under the disclosure of the evidence as it has been introduced disclosing the fact that she has signed and delivered to her husband a written assignment of the bank stock in question, therein containing a power to transfer the same and use the same, is estopped from disputing the sale or transfer or the delivery; for the reason, second, that the defendant is not bound by the statements of the plaintiff or her husband in its absence concerning the use to be made or any changes to be made in the certificate; and for the reason, third, that the defendant cannot be bound by any facts elicited from plaintiff or her husband which would tend to show any secret agreement between her and her husband in respect to the stock in question.

The court overrules the objection.

The defendant excepts. (P. R., pp. 66 and 67.)

A. That I hadn't signed it in the right place.

The defendant moves to strike out the answer of the witness for the reason that it cannot be bound by the statements of the husband to the witness, the plaintiff, in the absence of the defendant.

The court overrules the motion.

The defendant excepts. (P. R., p. 66.)

Q. Did he ever, at any time, give you any money or anything else for it?

The defendant objects to the question for the reason that it is for the jury, under proper instructions from the court to say whether anything of value in the legal sense was given for the assignment and de

livery of the stock and not for the witness; that covers every consideration there could possibly be.

The court overrules the objection.

The defendant excepts.

A. No. (P. R. p. 67 (128).)

Q. Did the Citizens Bank ever give you any money for this certificate?

A. No.

Q. Did you ever receive any money from the Citizens Bank at the time, or after you let your husband have that certificate?

A. No, I never got any money from them. (P. R., p. 67.)

(g)

CHARLES E. ARNT:

Q. And it was never transferred on the books of the First National Bank from Mrs. Opperman's name, either, was it?

The defendant objects to the question for the reason that he cannot have any knowledge of what was done in the office of the First National Bank. And there is better evidence, if it was transferred.

The court overrules the objection.

The defendant excepts.

A. Not to my knowledge. (P. R., p. 72 (134).)

(n)

Upon the issues on the said complaint and an answer in general denial, the jury on the 18th day of January, 1913, returned a verdict against the said petitioner to the effect that she was the owner and

entitled to the possession of the said certificate of stock, and that the defendant unlawfully detains the same and that the value thereof is thirty-one hundred fifty dollars ($3,150). (P. R., p. 22.)

(o)

That upon the said verdict, the court rendered judgment. (P. R., p. 30.)

(p)

That thereafter on the 31st day of January, 1913, the said petitioner filed its motion for a new trial. (P. R., p. 39.)

(q)

And thereupon on the 29th day of May, 1913, the said motion for a new trial is overruled and the defendant was given exceptions. (P. R., p. 45 (91).)

(r)

And thereupon on the 10th day of September, 1913, the said cause is submitted to the Appellate Court for judgment and decree. (P. R., p. 119 (218).)

(s)

And afterwards on the 26th day of May, 1915, the Supreme Court of the State of Indiana transfers said case to the Supreme Court of the State of Indiana. (P. R., p. 119.)

(t)

And thereafter said Supreme Court of the State of Indiana in an opinion announced its decision in said cause and affirmed the judgment in the court below. (P. R., p. 120 (225).)

(u)

And thereafter, within due time, on the 12th day of April, 1917, the said petitioner filed its petition for a rehearing. (P. R., p. 126.)

(v)

And that thereafter on the 18th day of May, 1917, the said Supreme Court of the State of Indiana, overruled the petition for rehearing. (P. R., p. 127 (242).)

(w)

That thereafter the said petitioner filed its petition for a writ of error to this court. (P. R., p. 132.)

II.

Questions involved.

1. The questions involved are whether an assignment of the certificate of stock in a national banking corporation, organized under the laws of the United States, before it conveys the legal or absolute title therein, must be transferred on the books of the bank.

2. Whether the Supreme Court of the State of Indiana erred in deciding that under the construction by the United States Supreme Court of the Federal National Banking Act, in holding that an assignment of a certificate of national bank stock without a transfer on the books of the banking corporation, is not in point, for the reason that respondent might as substance, and not form is regarded, show that the certificate was respondent's property.

3. Whether the Supreme Court of the State of Indiana erred in deciding that the respondent, Mary Opperman, in signing her name to the printed assignment of certificate of stock of the First National Bank, and thereafter delivering the said certificate of stock so assigned to her husband, Henry A. F. Opperman, and after the said Henry A. F. Opperman had received it, and had delivered the said certificate of stock to petitioner, as collateral security, for a loan, that said respondent, Mary Opperman, in a suit of replevin for said stock, from petitioner, could show orally that she, by said assignment, did not vest legal title to the said stock in said Henry A. F. Opperman; and show orally that she received no consideration from her husband for said certifi cate. And that Henry A. F. Opperman was permitted to show orally that he was not the legal owner of the said certificate of stock.

4. Whether the Supreme Court of the State of Indiana erred in deciding that the *nisi prius* court of Indiana did not err when it instructed the jury trying the case, that when the respondent signed her name to the certificate of stock, that she did not convey the title to such stock, and that before her cause of action can be defeated, the petitioner must prove by a preponderance of evidence that the transferee Henry Opperman represented to the bank that he was the owner of the said stock and that the said bank believed him, not knowing the statement to be false, and not knowing that the respondent was the owner of stock. That upon these propositions the burden is on the petitioner. And further that if she signed the certificate in blank and gave it to her

husband for him to secure his debt, then she was surety.

That the said court erred in refusing to charge the jury that if the respondent signed and executed the assignment on the certificate of stock, which purported to sell the stock and voluntarily placed the stock in the possession of her husband, and the husband put up the stock with the petitioner, and did not disclose that he was not the owner, and the petitioner had no knowledge that he was not the owner, that the petitioner was not required to make inquiry of the capacity of the respondent, nor can knowledge be implied to it.

It also erred in refusing to instruct the jury that where the respondent placed the title of property, and there is nothing to put the proposed purchaser on guard, such person so placing such title, is estopped from seeking to recover it.

5. Whether the Supreme Court of the State of Indiana erred in indicating that the *nisi prius* court of the State of Indiana did not err when it refused to instruct the jury that the transfer of the stock on the books of the bank has no vitality or force; and likewise erred when it refused to instruct the jury that the petitioner had the right to assign or give the stock to her husband.

III.

Admission of evidence.

(a)

On the trial of the said cause the said Henry Opperman was permitted to testify to a state of facts that had the tendency to prove that the said certificate of stock was the property of his wife, Mary Opperman, and that he had no right, title or interest in the same when he delivered it to your petitioner, such testimony being in substance as follows:

I gave her instruction as to writing her name. (P. R., p. 50.)

At the time I gave this certificate to the bank, I received no money from the bank. (P. R., p. 52.)

The money was placed to my credit.

My wife received nothing from the bank for it. (P. R., p. 53.)

At the time I got certificate I did not give my wife any money or anything else for it. (P. R., p. 55.)

When I put up certificate with the bank, my wife received nothing from the bank. (P. R., p. 55.)

None of the money received for the stock or any part to pay debts of my wife. (P. R., p. 56.)

Nor to pay for any property of my wife. (P. R., p. 56.)

She got the stock from her father's estate. (P. R., p. 56.)

Raised by objections and exceptions on the pages designated.

(b)

On the trial of the said cause, the said Mary Opperman was permitted to testify to conversations between herself and her husband and which had the tendency to prove that your petitioner had full knowledge of the claim, that Henry Opperman had no right or title in or to the said certificate of stock. Such testimony being in substance as follows:

> He said he wanted it as security to a loan of some money at the Citizens Bank. (P. R., pp. 65, 66.)
>
> At the time I handed the certificate to him (husband) he did not give me any money or anything else for it, nor did he at any time, or ever give me anything or money. Never received any money from Citizens Bank for it. (P. R., p. 67.)
>
> Nor did I ever receive anything from Citizens Bank for the certificate. (P. R., p. 68.)
>
> Raised by objections and exceptions on the pages designated.

(c)

On the trial of said cause, the cashier (C. E. Arnt) of petitioner's bank, was permitted to testify that the stock was never transferred on the books of the issuing bank. (P. R., p. 72.)

> Raised by objections and exceptions on the pages designated.

IV.

At the trial of the said cause the nisi prius court of the State of Indiana, gave certain instructions to the jury, which were severally excepted to as shown at printed record page 15, (28).

(a)

INSTRUCTION 4.

Given.

The statutory law of the State of Indiana provides that "a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner, and such contract as to her, shall be void," and if you find from the evidence that Mary Opperman was the owner of the certificate here in controversy and while she was so the owner, her husband, with her consent, placed the same in the possession of defendant to secure the payment to defendant of indebtedness due or to become due it from said husband, then I instruct you said arrangement constituted said Mary Opperman a surety and under the statute was void as to her, and after proper demand made by her on defendant, she was entitled to regain possession of said certificate and is entitled to your verdict, unless she became estopped as hereinafter explained. (P. R., p. 11.)

Raised by exceptions to the giving of such instruction. (P. R., p. 15.)

(b)

INSTRUCTION 5.

Given.

The defendant contends that the plaintiff is estopped to claim ownership, and demand possession of the certificate of stock in question, because she signed the certificate of stock, in blank, and delivered said certificate of stock to her husband, Henry F. Opperman, and permitted him to take said certificate to the defendant, and represent to the defendant that he, the said Henry A. F. Opperman, was the owner thereof, which representation the defendant contends, that it, through its cashier, Charles E. Arnt, then believed to be true, and accepted said certificate as security, upon the statement of said Henry F. Opperman, not knowing the same to be false, and not knowing that Mary Opperman owned the certificate of stock in question. The burden of proving the facts constituting this estoppel rests upon the defendant, and before the plaintiff's cause of action can be defeated, because of such estoppel, the defendant must prove by a preponderance of all the evidence in the case that the facts constituting such estoppel existed; that the defendant did not know, or have reason to know that Mary Opperman was the true owner of said certificate of stock at the time it was accepted as security by the defendant. (P. R., p. 11.)

Raised by exceptions to the giving of such instructions. (P. R., p. 15.)

(c)

INSTRUCTION 6.

Given.

The burden is on defendant to establish the facts constituting an estoppel. The elements of such an estoppel are as follows, viz.: First: That there was a misrepresentation or concealment of material facts. Second: That the misrepresentation was made with knowledge of the facts. Third: That the party to whom it was made was ignorant of the truth of the matter. Fourth: That it was made with the intention that the other party should act upon it, and fifth: That the other party was induced to act upon it, to his injury. (P. R., p. 12.)

Raised by exceptions to the giving of such instructions. (P. R., p. 15.)

(d)

INSTRUCTION 12.

Given.

If you find from the evidence that the plaintiff, Mary Opperman, signed the assignment on the certificate of stock in question and delivered it to her husband for the sole purpose of having him deposit it with the defendant bank as security for a debt owing by her husband to the defendant bank and you further find that her said husband did deposit the certificate with the bank as security for his debt, then the transaction constituted a contract of suretyship on her part, as surety for her husband's debt. (P. R., p. 13.)

Raised by exceptions to the giving of such instructions. (P. R., p. 15.)

V.

The nisi prius court of the State of Indiana refused to give a certain instruction to the jury, which raised a Federal question again, which said instruction was tendered by your petitioner and said court refused, which refusal was excepted to as shown in printed record, page 21 (40).

(a)

INSTRUCTION REFUSED.

No. 5. The court instructs you that the provision in the assignment of the certificate, to wit: "Transferrable only on the books of the bank in person or by attorney on the surrender of this certificate," has no vitality or force whatever. (P. R., p. 16.)

Raised by exceptions to refusal to give each of such instructions. (P. R., p. 21.)

(b)

INSTRUCTION REFUSED.

No. 18. I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to her husband or any other person. And if you find from the evidence that she signed and executed a written assignment of said certificate of stock, which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid

in the possession of her husband, and her husband took the same to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt. (P. R., p. 19.)

Raised by exception to refusal to give each of such instructions. (P. R., p. 21.)

(c)

INSTRUCTION REFUSED.

No. 22. A married woman cannot claim against the holder of collateral the rights of a surety when her husband had the title to the property that he placed in the hands of the defendant as collateral, and where there is nothing to put the holder of the collateral on notice of the wife's equitable interest in the property. (P. R., p. 20.)

Raised by exceptions to refusal to give each of such instructions. (P. R., p. 21.)

VI.

Specification of errors relied upon.

1. Because the Supreme Court of Indiana decided, in sustaining the demurrer to the amended second paragraph of answer, did not state a cause of defense for the reason that an assignment of certificate

of stock in a national banking corporation before it conveys the legal or absolute title therein, must be transferred on the books of the bank; that the title to the said stock was especially set up and claimed under the laws of the United States, being Section 12 of Act June 3, 1864, said section reads as follows:

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

2. The Supreme Court of the State of Indiana erred in deciding that under the construction by the United States Supreme Court of the Federal National Banking Act, in holding that an assignment of the certificate of national bank stock without a transfer on the books of the banking corporation, is not in point. In its decision that respondent might as substance, and not form is regarded, show that the certificate was respondent's property.

3. That the Supreme Court of the State of Indiana erred in deciding that the respondent, Mary Opperman, in signing her name to the printed assignment of certificate of the First National Bank, and thereafter delivering the said certificate of stock so assigned to her husband, Henry A. F. Opperman; and after the said Henry A. F. Opperman had delivered the said certificate of stock to petitioner as collateral security for a loan, that the said respondent, Mary Opperman, in a suit of replevin for said

stock from petitioner, could show orally that she, by the said assignment did not vest legal title to said stock to said Henry A. F. Opperman; and show orally that she received no consideration from her husband for said certificate. And that Henry A. F. Opperman was permitted to show orally that he was not the legal owner of the said certificate of stock.

4. The court erred in its charge to the jury as requested by the respondent, in its said several instructions numbered 4, 5, 6 and 12.

The trial court erred in charging the jury as follows:

INSTRUCTION 4.

Given.

The statutory law of the State of Indiana provides that "a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner, and such contract as to her, shall be void," and if you find from the evidence that Mary Opperman was the owner of the certificate here in controversy and while she was so the owner, her husband, with her consent, placed the same in the possession of defendant to secure the payment to defendant of indebtedness due or to become due it from said husband, then I instruct you said arrangement constituted said Mary Opperman a surety and under the statute was void as to her, and after proper demand made by her on defendant, she was entitled to regain possession of said certificate and is entitled to your verdict, unless she became estopped as hereinafter explained. (P. R., p. 11.)

The trial court erred in charging the jury as follows:

INSTRUCTION 5.

Given.

The defendant contends that the plaintiff is estopped to claim ownership, and demand possession of the certificate of stock in question, because she signed the certificate of stock, in blank, and delivered said certificate of stock to her husband, Henry F. Opperman, and permitted him to take said certificate to the defendant and represent to the defendant that he, the said Henry A. F. Opperman, was the owner thereof, which representation the defendant contends, that it, through its cashier, Charles E. Arnt, then believed to be true, and accepted said certificate as security, upon the statement of said Henry F. Opperman, not knowing the same to be false, and not knowing that Mary Opperman owned the certificate of stock in question. The burden of proving the facts constituting this estoppel rests upon the defendant, and before the plaintiff's cause of action can be defeated, because of such estoppel, the defendant must prove by a preponderance of all the evidence in the case that the facts constituting such estoppel existed; that the defendant did not know, or have reason to know, that Mary Opperman was the true owner of said certificate of stock at the time it was accepted as security by the defendant. (P. R., p. 165.)

The trial court erred in charging the jury as follows:

INSTRUCTION 6.

Given.

The burden is on defendant to establish the facts constituting an estoppel. The elements of such an estoppel are as follows, viz.: First: That there was a misrepresentation or concealment of material facts. Second: That the misrepresentation was made with knowledge of the facts. Third: That the party to whom it was made was ignorant of the truth of the matter. Fourth: That it was made with the intention that the other party should act upon it, and fifth: That the other party was induced to act upon it, to his injury. (P. R., p. 12.)

The trial court erred in charging the jury as follows:

INSTRUCTION 12.

Given.

If you find from the evidence that the plaintiff, Mary Opperman, signed the assignment on the certificate of stock in question and delivered it to her husband for the sole purpose of having him deposit it with the defendant bank as security for a debt owing by her husband to the defendant bank and you further find that her said husband did deposit the certificate with the bank as security for his debt, then the transaction constituted a contract of suretyship on her part, as surety for her husband's debt. (P. R., p. 13.)

5. The trial court erred in refusing to charge the jury as requested by this petitioner, in its said several instructions numbered 5, 18 and 22.

The trial court erred in refusing to charge the jury as requested by this petitioner, in its instruction number 5, which is as follows:

INSTRUCTION REFUSED.

No. 5. The court instructs you that the provision in the assignment of the certificate, to wit: "Transferable only on the books of the bank in person or by attorney on the surrender of this certificate," has no vitality or force whatever. (P. R., p. 16.)

The trial court erred in refusing to charge the jury as requested by this petitioner, in its Instruction Number 18, which is as follows:

INSTRUCTION REFUSED.

No. 18. I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to her husband or any other person. And if you find from the evidence that she signed and executed a written assignment of said certificate of stock, which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband took the same to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be

imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt. (P. R., p. 19.)

The trial court erred in refusing to charge the jury as requested by this petitioner, in its Instruction Number 22, which is as follows:

INSTRUCTION REFUSED.

No. 22. A married woman cannot claim against the holder of collateral the rights of a surety when her husband had the title to the property that he placed in the hands of the defendant as collateral, and where there is nothing to put the holder of the collateral on notice of the wife's equitable interest in the property. (P. R., p. 20.)

6. That the Supreme Court of the State of Indiana erred in affirming the judgment of the Nisi Prius Court of the State of Indiana.

VII.

Manner in which questions involved are raised.

For convenience we will number the manner of raising the several questions like the question involved.

1. This question was raised by a demurrer to the amended second paragraph of answer for the reason that it did not state a cause of defense (P. R., p. 8 (17), and which demurrer was sustained and excepted to by the petitioner. (P. R., p. 8 (17).

It was also raised by an instruction tendered, which reads as follows:

No. 5. The court instructs you that the provision in the assignment of the certificate to wit: "Transferrable only on the books of the bank in person or by attorney on the surrender of this certificate," has no vitality or force whatever. (P. R., 16 (31).)

Which was tendered and refused by the court and excepted to. (P. R., p. 21 (40).)

It was also raised by an instruction given, which reads as follows:

INSTRUCTION 5.

The defendant contends that the plaintiff is estopped to claim ownership and demand possession of the certificate of stock in question, because she signed the certificate of stock in blank and delivered said certificate of stock to her husband, Henry F. Opperman, and permitted him to take said certificate to the defendant, and represent to the defendant that he, the said Henry A. F. Opperman, was the owner thereof, which representation the defendant contends, that it, through its cashier, Charles E. Arnt, then believed to be true, and accepted said certificate as security, upon the statement of said Henry F. Opperman, not knowing the same to be false, and not knowing that Mary Opperman owned the cerificate of stock in question. The burden of proving the facts constituting this estoppel rests upon the defendant, and before the plaintiff's cause of action can be defeated, because of such estoppel, the defendant must prove by a preponderance of all the evidence in the case that the facts constituting such

estoppel existed; that the defendant did not know, or have reason to know that Mary Opperman was the true owner of said certificate of stock at the time it was accepted as security by the defendant. (P. R., p. 11 (23).)

Which was given and excepted to by petitioner. (P. R., p. 21 (40).)

2. Raised in the same manner as No. 1.

3. Raised on objections to the oral testimony given by respondent:

(P. R., p. 65 (123), (124).)
(P. R., p. 66 (125), (126).)
(P. R., p. 67 (128).)
(P. R., p. 72 (134).)

And oral testimony given by Henry A. F. Opperman, petitioner's grantor over petitioner's objection:

(P. R., p. 52 (104).)
(P. R., p. 55 (108).)
(P. R., p. 56 (109).)

ARGUMENT.

The petitioner has divided the points of law to be discussed into two parts. Their discussion under the FIRST PART will introduce questions involved under the prayer of the petitioner for the granting of a writ of certiorari.

The discussion under the SECOND PART will introduce questions involved under the prayer of the petitioner to substitute the transcript and printed records filed in return to the writ of error for the return of the writ of certiorari.

PART ONE.

For a writ of certiorari.

Point I.

A FEDERAL QUESTION.

Complaint in a court of law for the replevin of a certificate of stock in a national banking corporation, organized under the laws of the United States, to this complaint an answer setting forth that certificate was signed in blank and under United States laws conveyed the legal title by delivery.

Demurrer sustained to this answer for want of facts.

That the said answer especially set up and alleged

that the said First National Bank of Michigan City was at the time said certificate was issued and ever since has continued to be a corporation organized and doing business under and by virtue of the Banking Laws of the United States of America; that the respondent assigned said certificate in blank and without restrictions, and that this petitioner relying upon such facts and the certificate being in the possession of Henry A. F. Opperman, it granted him extension of certain notes then owing by him and for that reason the said respondent should be estopped to set up any claim to said certificate.

Complaint in P. R., p. 2 (3).
Answer in P. R., p. 5 (11).
Demurred in P. R., p. 8 (17).

The Federal question was again raised by an instruction tendered by petitioner, wherein it requested the court that the provision in the assignment of the certificate, to wit:

"Transferable only on the books of the bank in person or by attorney on the surrender of this certificate," has no vitality or force whatever. (P. R., p. 16 (31).)

And the Federal question was again raised by the tender of an instruction, which was refused, which reads as follows:

No. 18. I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to her husband or any other person. And if you find from the evidence that she signed and executed a written assignment of said certificate of stock which purported by its language

to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband took the same to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt. (P. R., p. 19 (37).)

(a) Where any title * * * is claimed under the statute of * * * the United States, and the decision is * * * against the title * * * especially set up or claimed, by either party, under such * * * statute * * *, the judgment * * * can be reviewed * * * upon a writ of certiorari.

Judicial Code, Sec. 237, as amended.

Phila. & Reading Coal Co. v. *Gilbert*, 38 Sup. Ct. Rep. 58. Decided November 26, 1917.

The plain reason is that in all such cases it has claimed in the State Court a right or immunity under a law of the United States and it has been denied them.

Where a party in a state court insists, by way of objections to or requests for instructions upon a construction of a statute of the United States, which will lead, or, on possible findings of fact from the evidence, may lead to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the questions

thus raised may be reviewed in the United States Supreme Court.

Code of 1916, Sec. 237.

St. Louis & Iron Mt. Ry. v. *Taylor,* 210 U. S. 293.

Also:

Acme Harvester Co. v. *Beckman Lumber Co.,* 222 U. S. 305.

Mutual Life Co. v. *McGrew,* 188 U. S. 291.

The Federal right is not required to be pleaded in any special or particular form. It is enough that it be relied upon and in proper manner called to the attention of the court. The courts take judicial notice of the statutes. It is the right, privilege, or immunity of Federal origin which must be brought to the attention of the State Court.

St. Louis Iron Mt. v. *So. Ry.,* 243 U. S. 592.

Where a title was dependent upon the Act of Congress of February 17, 1815, for the relief of the inhabitants of New Madrid, and the decision was against the claim set up under that statute, it is a proper case for a writ of error under 25th Section of the Judiciary Act.

Rector v. *Ashley,* 73 U. S. 142; 6 Wall. 142.

And again the question is recognized as having been raised as the Indiana Supreme Court in its decision, the rule that, under the construction by the Federal Courts of the Federal National Bank Act, an assignment of a certificate of National Bank stock without transfer on the books of the banking corporation, is a complete transfer, vesting title in the

transferree, is not in point. Even though the transfer had been made on the bank's books, the respondent might, in as substance, and not form is regarded, show that the certificate was her property, and the completeness of the transfer, whether by assignment only, or by entry on the books of the corporation would be pertinent only to the issue of estoppel. (P. R., p. 124 (230).)

Where a national bank is sought to be charged as stockholder in another corporation, the averment in its answer that the stock was issued to it "without authority of law" must be construed as referring to the law of the United States governing national banks, and therefore raises a Federal question.

California National Bank v. *Kennedy,* 167 U. S. 362.

Where is drawn in question the validity of a statute of or the construction of a statute of the United States and the decision is against the title set up or claim, such judgment may be re-examined by writ of error in the United States Supreme Court.

Martin v. *Hunter,* 1 Wheat 306.

Point II.

When the respondent signed the certificate of stock in the National Banking Corporation without any restrictions, such assignment conveys the legal and absolute title thereto without such transfer having been made on the books of the bank.

This involves the first specification of error of this brief.

It is the contention of the petitioner that the Su-

preme Court of the State of Indiana erred, when it found in its decision that the legal title to the certificate of stock had not passed when it was signed in blank.

Answer is good which alleges that a certificate in a national banking association is signed in blank and delivered to a third party.

The provisions of the National Banking Act is, that the stock shall be transferrable on the books of the bank in such manner as may be prescribed by its by-laws. A by-law which provides that the stock shall not be transferable only on the books of the bank does not affect the construction of the act, a national bank being a federal corporation remains under the federal statute, it depends upon the construction given by the United States courts; this must be determined by the statute itself, and the construction given to it by the Supreme Court of the United States, so far as it has been construed by that court.

Sibley as Administratrix v. *National Bank*, 133 Mass. 515.

Knight v. *Old National Bank*, Federal Cases No. 7,885.

Black v. *Zacharie*, 3 Howard 483.

Bank v. *Lanier*, 11 Wall. 369.

National Bank v. *Watsontown Bank*, 105 U. S. 217.

Johnston v. *Laflin*, 103 U. S. 800.

Bank v. *Elliot*, 7 Fed. Rep. 369.

Dickinson v. *Bank*, 129 Mass. 279.

The answer alleges that the stock in controversy was that of a bank organized under the United States National Banking Laws.

As between the owner of shares of stock in a national bank and the purchaser, the property in shares passed to the latter by duly signing and delivery of the certificate, with the accompanying power of attorney, without the formality of a transfer upon the books of the bank.

Bath Sav. Inst. v. *Sagadahoc Bank*, 89 Me. 500.

Johnston v. *Laflin*, 103 U. S. 800.

Cecil Natl. Bank v. *Watsontown Bank*, 105 U. S. 217.

Colbrooke on Collateral Securities, Sec. 270, p. 472 (2d Ed.).

Doty v. *Larimore Natl. Bank*, 3 N. Dak. 9; S. C.

Sibley v. *Natl. Bank*, 133 Mass. 515.

Bank v. *Williston*, 138 Mass. 244.

It follows that when Henry Opperman received from Mary Opperman the certificate of stock in question signed by her in blank it vested in him the legal title of such stock. The assignee of shares of stock in a national bank with power to transfer the same takes an absolute title to the shares, subject to any lien or liens of the bank created by articles or by-laws in favor of the bank and on presentment may require a new one against subsequent or attaching creditor.

Bank v. *Lanier*, 11 Wall. 369.

Moores v. *Bank*, 111 U. S. 163; S. C., 4 Sup. Ct. Rep. 345.

Dickinson v. *Bank*, 129 Mass. 279.

Sibley v. *Bank*, 133 Mass. 515.

Bath Sav. Ins. v. *Sagadahoc Bank*, 89 Me. 500; S. C. 36 Atl. 996.

Bank v. *Elliot*, 7 Fed. Rep. 369.

Johnson v. *Laflin*, 103 U. S. 800.

Unquestionably where the stock of a national banking corporation is by the terms of its by-laws or charter transferable on its books, still the purchaser who receives a certificate with a power of attorney, acquires the entire title, legal and equitable as between himself and seller, with all the rights which the latter possessed, but as between himself and the bank corporation he acquires only the equitable title which the corporation is bound to recognize whenever he presents himself.

Knight v. *Old Natl. Bank,* Federal Cases No. 7,885.

Point III.

The Supreme Court erred when it decided that the Federal authorities do not apply. One of the phases of this cause turns on this holding.

This involves the second specification of error of this brief.

If it can be held that the Federal decisions do not apply in this case and by reason of such holding this petitioner has lost its title to the said stock, or if it is held that the Federal decisions do apply, and by reason of such holding this petitioner would hold its title to said stock, then it becomes and is clear that the construction made by the Federal decisions are involved and are controlling in the decision of this cause, and should have been followed in the determination of the cause.

In this case, at printed record page 124 (230), the Supreme Court of the State of Indiana held that the construction by the Federal Courts of the Federal Bank Act is not in point. That the respondent

might, inasmuch as substance, and not form is regarded, show that the certificate was her property, and the completeness of the transfer, whether by assignment only or by an entry on the books of the corporation, would be pertinent only to the issue of estoppel.

Your petitioner presenting the contention that, under the Federal authorities, and the application of the same, to the facts in this case, there can be no foundation to the claim that, in this cause the fact is, the wife simply pledged her property to be used or returned, or released, contingent upon the default or payment of her husband of his debts, the arrangement is not an absolute or complete parting with her title, though the face of the papers signed by her may so indicate; but that under such authorities and the facts in the case, it is clear that the wife in signing the said certificate, and presenting the same to her husband, without any restriction being stated in the paper, vested in her husband the legal title to the same, and that she passed her entire title thereby to her husband, and when the husband put up the stock as collateral, he vested his title in your petitioner, subject only to his right to redeem the same under his collateral contract.

The Supreme Court of the United States has, constitutionally, appellate jurisdiction under the Judiciary Act of 1789, Chapter 20, Section 25 (Section 237 of the Judicial Code), from the final judgment of the highest court of law of a state, having jurisdiction of the subject-matter of the suit, where is drawn in question the question of a statute and the decision

is against the title, especially set up or claimed by either party under such clause of the statute.

Cohens v. *Virginia,* 6 Wheat. 379.

This petitioner presents that when a title is claimed under a Federal statute, the reasoning or proceedings of the State Court cannot defeat the title. That if the question is raised in a proper way at a proper time, then the Federal authorities control as to the law of the case, and if the State Courts refuse to give force to the Federal authorities, the Supreme Court of the United States will review, correct and enforce the same.

It is the contention of this petitioner that the respondent executed an assignment of her certificate of stock in blank and after so doing delivered that certificate to Henry A. F. Opperman; that she vested in said Henry A. F. Opperman the legal title of said certificate of stock and such vesting is governed by the statutes of the United States as construed by the decisions of this court, regardless that substance and not form is regarded by the Supreme Court of the State of Indiana.

Questions of assignment of stock in a national bank "must be determined by the statute itself, and the construction given to it by the Supreme Court of the United States."

Sibley v. *Quinsigamond National Bank,* 133 Mass. 515.

Point IV.

The Supreme Court erred in deciding that the respondent Mary Opperman, after the assignment of the certificate of stock and the delivery thereof unto Henry A. F. Opperman, and after Henry A. F. Opperman delivered the certificate to the petitioner as collateral, that she, in a suit of replevin for said stock, could show orally that she, by said assignment did not vest legal title to said stock in the said Henry A. F. Opperman.

This involves the third specification of error of this brief.

At the trial of the said cause the said respondent was asked the following questions and gave the following answers, over the objections of this petitioner, to wit:

Q. And where was that certificate at that time?

A. Upstairs in the bedroom—my bedroom.

Q. And when he asked you for it did he tell you what he wanted to do with it?

The defenadnt objects to the question for the reason that the defendant is not bound by the talk and conversation of the plaintiff and her husband in its absence. Second ground: that it is not bound by any secret agreement entered into by and between the plaintiff and her husband in its absence and without its knowledge.

The court overrules the objection.

The defendant excepts.

A. Yes. (P. R., p. 65.)

Q. What did he say that he wanted with it?

The defendant objects to the question on the ground that it cannot be bound by the talk and conversation between the plaintiff and her husband in its absence.

The court overrules the objection.

The defendant excepts.

A. As security. (P. R., p. 65 (123).)

The defendant moves to strike out the answer for the reason that it does not purport to say what her husband said and for the further reason that the defendant cannot be bound by the talk and conversation of the plaintiff with her husband in its absence; second, that the defendant cannot be bound by the secret agreements made and entered into by the plaintiff and her husband in its absence.

The court overrules the objection.

The defendant excepts. (P. R., p. 65.)

Q. What, if anything, did he say at that same time as to where or with whom he was going to use it as security?

The defendant objects to the question upon the ground, first: that the plaintiff here is estopped from denying the purport and meaning of her written power of attorney and assignment of this stock; second ground: that the defendant is not bound by the conversation called for, and in its absence, between the plaintiff and her husband; and for the reason, third: that the defendant cannot be bound in the circumstances of this case by the secret and undisclosed arrangements or agreements or statements

entered into in the absence of the defendant or any of its officers.

The court overrules the objection.

The defendant excepts.

A. Yes, he did. (P. R., p. 66 (125).)

Q. Notice the question, Mrs. Opperman: what, if anything, did he say?

A. He said he wanted it as security to a loan of some money at the Citizens' Bank.

The defendant objects and moves to strike out the answer for the reason, first: that the plaintiff is estopped from making that statement by reason of the fact that it appears in evidence that she signed and delivered a written assignment of this bank stock in which was contained a power of attorney to transfer it on the books of the bank; for the reason, second: that the defendant can not be bound by the statement made in its absence and in the absence of any of its officers; and third: that the defendant is not bound by any secret agreement or arangement or understanding or statement made by the husband of the plaintiff and the plaintiff.

The court overrules the objection.

The defendant excepts. (P. R., p. 66.)

Q. And when he brought it back what did he say to you about the way you had signed it?

The defendant objects to the question, first: on the ground that the plaintiff in this case under the issues here and under the disclosure of the evidence as it has been introduced disclosing the fact that she has signed and delivered to her husband a written as-

signment of the bank stock in question, therein containing a power to transfer the same and use the same, is estopped from disputing the sale or transfer or the delivery; for the reason, second: that the defendant is not bound by the statements of the plaintiff or her husband in its absence concerning the use to be made or any changes to be made in the certificate; and for the reason, third: that the defendant cannot be bound by any facts elicited from plaintiff or her husband which would tend to show any secret agreement between her and her husband in respect to the stock in question.

The court overrules the objection the defendant excepts. (P. R., pp. 66 and 67.)

A. That I hadn't signed it in the right place.

The defendant moves to strike out the answer of the witness for the reason that it cannot be bound by the statements of the husband to the witness, the plaintiff, in the absence of the defendant.

The court overrules the motion.

The defendant excepts. (P. R., p. 66.)

Q. Did he ever, at any time, give you any money or anything else for it?

The defendant objects to the question for the reason that it is for the jury, under proper instructions from the court to say whether anything of value in the legal sense was given for the assignment and delivery of the stock and not for the witness; that covers every consideration there could possibly be.

The court overrules the objection.

The defendant excepts.

A. No. (P. R., p. 67 (128).)

Q. Did the Citizens' Bank ever give you any money for this certificate?

A. No.

Q. Did you ever receive any money from the Citizens' Bank at the time, or after you let your husband have that certificate?

A. No, I never got any money from them. (P. R., p. 67.)

(*a*) When the owner of stock signs in blank and delivers to the transferee, the legal, or whole title vests in such transferee.

See authorities in Point II.

(*b*) If a party has a horse in his possession and sells him, the law says, from the nature of the transaction, the vendor warranted the horse to belong to himself, and that he had a right to sell it. To permit the vendor, in such a case, to show that he did not have the right to sell, but had undertaken to sell that which did not wholly belong to him, would be to encourage and permit him to trifle with others who were acting in good faith, and to take advantage of his own wrong.

Kaiger v. *Brandenburg,* 4th Indiana App. 497.

A written instrument cannot be varied, controlled nor impeached by proof of contemporaneous verbal agreement.

Durland v. *Pitcairn,* 51 Indiana 445.

McGuire v. *South,* 54 Indiana Appellate 511.

American Insurance Company v. *Callahan,* 75 Indiana 170.

Parol evidence cannot be introduced if it tends to vary a written instrument.

Lowry v. *Meyer*, 52 Indiana 109.

A written contract, not ambiguous, indefinite, or uncertain, must be taken as it is written in the absence of a charge of fraud, and the intention of the parties therefrom.

Ochs v. *Carnahan Company*, 42 Indiana Appellate 164.

That parol evidence of an antecedent, or contemporaneous parol agreement will not be admitted to vary or change a written agreement and this rule applies to blank endorsements of promissory notes the same as to other contracts.

Brown v. *Nichols*, 123 Indiana 498.

The question whether the admission of a previous owner of a chose in action can be proved against the purchaser of him, who has bought for a fair consideration, and between whom and the former owner there exists no other relation than that of purchaser and seller.

It is not the case of a nominal purchase, the former owner retaining the equitable interest, but of an actual and complete transfer of all interest to the purchaser.

Tousley v. *Barry & Wife*, 16 New York 497.
Paige v. *Cagwin*, 7 Hill 361.
Stark v. *Boswell*, 6 Hill 405.

An assignor of a chose of action is estopped, to deny possession had not been transferred.

McMichael v. *Webster*, 54 New Jersey Equity 478.

Mortgagor is estopped to deny his title.

Jones on Mortgages, Sections 682, 1482.
Cook on Corporations, Section 416.

Pledgor of future property upon subsequent acquiring it is estopped as against his pledgee from asserting that he did not own it when he pledged it.

Woodward v. *Crump*, 94 Tennessee 369.

A portion of the evidence contained in the bill of exceptions consists of the declarations made by W. S. Huntington. Evidence of this character was given by each party, and admitted, notwithstanding the objection of the other. No principal can be found to justify the admission of this evidence. It has long been settled that the declarations made by the holder of a chattel or promissory note, while he held it, are not competent evidence in a suit upon it, or in relation to it, by a subsequent owner. This was settled in the State of New York in the case of *Paige* v. *Cagwin*, 7 Hill 361, and is now admitted to be sound doctrine. The same is true to the declarations of a mortgagee, *Earl* v. *Clute*, 2 Abb. Ct. App. Dec. 1; or of the assignor of a judgment, *Tousley* v. *Barry*, 16 N. Y. 497; or of an indorser, *Ireland* v. *Kip*, *Anth.* N. P., 142; or of a judgment debtor, *Legg* v. *Olney*, 1 Den. 202. Assuming that Huntington was the owner or holder of these notes, his declarations are not thereby made competent evidence.

The declarations of a party in possession of land are competent evidence as against those claiming the land under him, but are competent only to show the character of the possession, of the person mak-

ing them, and by what title he holds; but not to sustain or to destroy the record title.

Dodge et al. v. *Freeman's Savings and Trust Company*, 93 United States, 375, 3 Otto 379.

The questions were quite inadmissible as against the purchaser and assignee, since it was not shown to have had any notice of the conversation, and therefore in taking the certificate of stock, was only bound by the obligations imparted by the words in their ordinary commercial sense.

The Barnstable, 181 United States 464.

(*c*) It may be suggested that this evidence is admissible under the *res gestae* (P. R., p. 124 (229)), though this may be possible, still it is not evidence of the facts stated therein. It is purely hearsay as to such facts and is not evidence that Mr. Arnt made any such statement.

The statements made as a part of the *res gestae*, are not admissable testimonically to prove the facts stated.

Bank v. *Kennedy*, 17 Wall. 19 (U. S.).

The point against this testimony is that it tends to develop and prove the contention that the respondent did not transfer her stock to her husband, but rather that she let him have the stock in order that he may put it up as security with your petitioner as collateral to her husband's loan and that by reason thereof she was surety for her husband and that by reason thereof such assignment was void; and that your petitioner had knowledge of such facts and hence could not hold the said stock as against the respondent.

Your petitioner presents the contention that the respondent's act of so signing and delivering the said stock to her husband in fact vested the legal title to the said stock in her husband and she was bound by the act of her husband in putting up the same as collateral with your petitioner, and that it was not competent that respondent should so testify, because she, under such circumstances, should not be allowed to testify to any fact in relation thereto which would have any tendency to defeat the title of your petitioner to such stock as such collateral.

It may be suggested that such testimony was part of the *res gestae*. In answer to any such claim it may be suggested that though it were *res gestae* it should not be admitted to defeat your petitioner's title, and a further reason is that the said testimony is claimed as having brought notice to Mr. Arnt of the respondent's claim of her ownership of the said stock. If it should be held that the said testimony was admissable as a part of the *res gestae*, it has no probative force as tending to prove the facts alleged to have been made by Mr. Arnt, that is it only proves that the statements were made to her, but has no tendency to prove the truth of the facts involved in the said statements.

Point V.

The Supreme Court of Indiana erred in deciding that the trial court was not in error in its ruling that Henry A. F. Opperman, after the assignment to him by his wife of the said certificate of stock, and after he delivered the certificate of stock to the

petitioner as collateral, in a suit of replevin for said stock could show orally that the title thereof was not in him, the said Henry A. F. Opperman, but in his wife, Mary Opperman.

This involves the third specification of error of this brief.

At the trial of the said cause the said Henry A. F. Opperman, a witness called for and on behalf of the said respondent, was asked the following questions and gave the following answers, over the objections of this petitioner, to wit:

Q. Who, if anybody, gave her any directions as to writing her name on it? (P. R., p. 50 (99).)

The defendant objects to the question upon the ground that the bank is not bound by the talk and directions given by any conversation to Mrs. Opperman in their absence and they have not shown that they were present or that they gave any directions.

The court overrules the objection.

The defendant excepts.

A. I did; or rather I was directed to tell her.

The defendant moves to strike out the answer for the reason that the defendant is not bound by the directions or the talk of the husband of the plaintiff, Mrs. Opperman, such directions and talk having taken place in the absence of the defendant.

The court overrules the motion.

The defendant excepts. (P. R., p. 50.)

Q. Now, Mr. Opperman, at the time you gave this certificate of stock, which I believe is mentioned in this collateral agreement as certificate No. 385, did you receive any money from the Citizens Bank?

The defendant objects to the question for the reason it is material for him to deny any specific consideration.

The court overrules the objection.

A. No.

Q. Did your wife receive any money at that time?

A. No, sir. (P. R., p. 53 (104).)

Q. Now, did you get any other money than those items you have mentioned, from the bank?

A. That is all. (P. R., p. 55 (107).)

Q. At the time that you got this certificate of stock from your wife did you give her any money or anything else for it?

The defendant objects to the question for the reason the defendant bank is not bound by the acts or transactions that occurred during his absence nor any secret agreement between the wife and the husband.

The court overrules the objection.

The defendant excepts.

A. I didn't. (P. R., p. 55.)

The defendant moves to strike out the answer for the reason that the bank is not bound by the secret agreements between the witness and his wife, the plaintiff.

The court overrules the motion.

The defendant excepts. (P. R., p. 55.)

Q. At the time that you got this certificate from your wife and gave it to Mr. Arnt at the Citizens Bank did your wife receive anything from the bank for it?

The defendant objects to the question for the reason that this is a question that calls upon the witness to decide one of the legal issues in this case.

The court overrules the objection.

The defendant excepts.

A. No. (P. R., p. 55.)

The defendant moves the court to strike out the answer of the witness for the reason that the answer is the conclusion of the witness and it assumes to decide for the jury one of the facts which the jury must decide from all the facts and circumstances.

The court overrules the motion.

The defendant excepts. (P. R., p. 55.)

Q. Was this money that you borrowed of the Citizens Bank and for which the stock was put up as collateral used, or any part of it used to pay any debt of your wife's?

The defendant objects to the question for the reason he has specifically recided what he did with the money; this is simply cross-examining him on his own statement.

The court overrules the objection.

The defendant excepts.

A. It was not. (P. R., p. 56.)

Q. Was this money which you borrowed of the Citizens Bank and for which this stock was put up as collateral, or any part of it, used to pay for any property of your wife's or that she bought or that was bought for her?

The defendant objects to the question on the

ground that this is simply cumulative and cross-examing his own witness; he may ask if she bought any horse with it, any cows, any poultry, any blue sky, or anything else.

The court overrules the objection.

The defendant excepts.

A. It was not. (P. R., p. 56.)

Q. Do you know where your wife got that stock?

The defendant objects to the question as not being material in this case, the question at issue here being the title to the stock.

The court overrules the objection.

The defendant excepts.

A. Yes. (P. R., p. 56.)

The point against this testimony is that it tends to defeat the title of your petitioner to the said stock put up as collateral by the said witness. The evidence tends to prove that the said Henry Opperman had no title to the said stock which he had put up as collateral to the said loan, while your petitioner contends that it was incompetent in this case that the said Henry Opperman could testify to any state of facts that had any tendency to defeat the title of your petitioner to the said stock, because of the fact that your petitioner had derived its title thereto directly from the said witness.

The declarations of a holder of a chattel or promissory note, while he held it, are not competent evidence in a suit upon it or in relation to it, by a subsequent owner.

Dodge v. *Freedman's Company*, 93 United States 379.

Parol evidence is inadmissible to add to, vary, change the terms of a deed not attached on the ground of fraud or mistake.

Trullinger v. *Weeb,* 3 Indiana 198.

Doe et al. v. *Swails,* 3 Indiana 329.

Burns et al. v. *Jenkins et al.,* 8 Indiana 417.

New Albany & Salem R. R. Co. v. *Fields,* 10 Indiana 187.

Barnes v. *Bartlett,* 47 Indiana 98.

Parol evidence is not admissible to vary the legal import of the language used in a written instrument, than it is to vary or add to the language itself; to do one is to do the other; the result in either case is the same.

Fuller Administrator v. *Hapgood,* 39 Vermont 617.

The transfer of stock by delivery of the certificate, indorsed in blank, or with power of attorney, passes title without transfer on the company's books, though the by-laws provide to the contrary, and the transferee may fill in the blanks, and it may be filled in with the name of a remote transferee; the name inserted being immaterial to the transferror.

McCarthy v. *Crawford,* 238 Illinois 380.

The contention is not made that such evidence could not have been submitted by respondent through a proper witness, a different person, but the claim is that Henry Opperman was not in a position to give testimony against the title he has vested in your petitioner when he put up the said stock as collateral. His mouth was closed and should not have

been heard to utter any word of his in disparagement of your petitioner's title.

Where the owner puts his name on the back of a certificate of stock and allows it to go into the market with that transferrable quality about it, it does not lie in his mouth who offered it into the world in that shape, to deny his own words and actions.

McNeil v. *Tenth National Bank*, 46 New York 325.

Point VI.

The Supreme Court of the State of Indiana erred in deciding in favor of the admissibility of evidence of Charles E. Arnt, as to whether or not the said certificate of stock was transferred on the books of the First National Bank.

This involves the third specification of error of this brief.

At the trial of the said cause Charles E. Arnt was asked, on cross-examination, by the said respondent, the following question and gave the following answer, over the objection of this petitioner, to wit:

Q. And it was never transferred on the books of the First National Bank from Mrs. Opperman's name, either, was it?

The defendant objects to the question for the reason that he cannot have any knowledge of what was done in the office of the First National Bank. And there is better evidence, if it was transferred.

The court overrules the objection.

The defendant excepts.

A. Not to my knowledge. (P. R., p. 72 (134).)

This question and answer was improper in view of the fact that it was not necessary to transfer the stock to pass title, and it was not fair to this petitioner to intimate to the jury that it was necessary to transfer on the books before the title vested in the transferee, and there was better evidence, namely, the records of the bank showing no such transfer.

Whether or not the certificate of stock was transferred in the name of the transferee did not have anything to do with the title of the stock, so that such question and answer was erroneous for the reason that they gave the impression to the jury that it was essential to have the stock transferred before the title vested in the transferee.

Point VII.

The court erred in its charge to the jury as set forth in specification No. 4.

This involves the fourth specification of error of this brief.

The charge complained of is as follows:

INSTRUCTION No. 4.

(*Given.*)

The statutory law of the State of Indiana provides that "a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner, and such con-

tract as to her shall be void," and if you find from the evidence that Mary Opperman was the owner of the certificate here in controversy, and while she was so the owner her husband, with her consent, placed the same in the possession of defendant to secure the payment to defendant of indebtedness due or to become due it from said husband, then I instruct you said arrangement constituted said Mary Opperman a surety and under the statute was void as to her, and after proper demand made by her on defendant, she was entitled to regain possession of said certificate and is entitled to your verdict, unless she became estopped as hereinafter explained. (P. R., p. 11.)

Petitioner contends that this instruction No. 4 is erroneous for the reason that it was in the power of this respondent to the pay the debt of her husband, or to convey property to her husband, and when she executed the assignment of the certificate of stock and then delivered it to her husband for the purpose of her husband using it as collateral, she is estopped from denying her acts, as is well stated in the following language:

The assignment of the certificate of stock estops the transferrer from claiming any further title in the stock as against subsequent bona fide transferees, although such assignment be not registered.

Cook on Stock and Stockholders, 2nd Edition, Section 378.

Point VIII.

The Supreme Court of the State of Indiana erred in each of its charges to the jury, being instruction No. 5, and being instruction No. 6, as set forth in specification 4.

The charge No. 5 complained of is as follows:

INSTRUCTION No. 5.

The defendant contends that the plaintiff is estopped to claim ownership, and demand possession of the certificate of stock in question, because she signed the certificate of stock in blank and delivered said certificate of stock to her husband, Henry F. Opperman, and permitted him to take said certificate to the defendant, and represent to the defendant that he, the said Henry A. F. Opperman, was the owner thereof, which representation the defendant contends that it, through its cashier, Charles E. Arnt, then believed to be true, and accepted said certificate as security, upon the statement of said Henry F. Opperman, not knowing the same to be false, and not knowing that Mary Opperman owned the certificate of stock in question. The burden of proving the facts constituting this estoppel rests upon the defendant, and before the plaintiff's cause of action can be defeated, because of such estoppel, the defendant must prove by a preponderance of all the evidence in the case that the facts constituting such estoppel existed; that the defendant did not know, or have reason to know, that Mary Opperman was the true owner of said certificate of stock at

the time it was accepted as security by the defendant. (P. R., p. 11.)

The charge No. 6 complained of is as follows:

INSTRUCTION No. 6.

The burden is on defendant to establish the facts constituting an estoppel. The elements of such an estoppel are as follows, viz.: First. That there was a misrepresentation or concealment of material facts. Second. That the misrepresentation was made with knowledge of the facts. Third. That the party to whom it was made was ignorant of the truth of the matter. Fourth. That it was made with the intention that the other party should act upon it, and, fifth, that the other party was induced to act upon it to his injury. (P. R., p. 12.)

The petitioner makes two points against the said instruction No. 5.

(*a*) The statement:

> "The burden of proving the facts constituting this estoppel rests upon the defendant, and before the plaintiff's cause of action CAN BE DEFEATED, because of such estoppel, the defendant must prove," etc.

The point against this clause of this instruction is that it assumes that plaintiff has proven her case.

Under the issues in this case the plaintiff was required to prove each material allegation of her complaint, and there was no phase of the case that relieved the plaintiff of this burden. The issue went to the jury and the burden was on plaintiff.

If the issue of estoppel was properly before the jury, then the burden of estoppel was on the defend-

ant. It was therefore error for the court to tell the jury that before its cause of action CAN BE DEFEATED, because of such estoppel, the defendant must prove.

Under the issues the plaintiff may have failed because of want of facts sufficient to convince the jury that she should have been entitled to recover on her complaint; and the court, having allowed the issue on the complaint to go to the jury, may have also heard the evidence on the question of estoppel.

Is it not clear that the court was in error in thus conceding that plaintiff had made out her case and that the question of estoppel was all that was in the case that could DEFEAT plaintiff's cause of action?

An instruction which assumes the existence of facts in dispute is erroneous.

Cincinnati Company v. *Case*, 174 Indiana 369.

If the plaintiff has sustained no injury by reason of the alleged trespass, still he is entitled to a verdict of nominal damages," assumes that a trespass had been committed, and was erroneous.

Steele v. *Davis*, 75 Indiana 191.

Another point against this instruction is this. The instruction tells the jury:

(*b*) "The defendant must prove by a preponderance of ALL THE EVIDENCE IN THE CASE that the facts constituting such estoppel existed."

The point against this part of the instruction is that it was error to charge that a preponderance of ALL THE EVIDENCE IN THE CASE was not a proper charge. The burden on this issue was not that defendant should prove by a preponderance of all the

evidence in the case, as much of the evidence in the case was and had no bearing at all on the question of estoppel. The instruction should have been that defendant should prove by a preponderance of the evidence bearing on the question of estoppel, and not of all the evidence in the case.

An instruction to the jury concerning the finding of a given fact must be instructed in considering such fact to confine themselves to the evidence bearing on such facts; and it is erroneous to instruct them to consider all the facts and circumstances in evidence in the case in reaching such determination.

Monongahela Company v. *Hardsaw,* 174 Indiana 369.

As to the instruction No. 6:

The facts in the case were these:

Mary Opperman was the owner of certificate No. 385, representing 15 shares of the stock in the First National Bank of Michigan City, Indiana, and endorsed the same without any restriction and delivered the same to her husband, Henry Opperman. The husband afterwards put up the same as collateral security with your petitioner. Under these facts during the trial the question of estoppel came up and the court gave to the jury this instruction No. 6.

Based on these facts the court undertook to instruct the jury as to the elements required of estoppel, saying:

First. That there was a misrepresentation or concealment of material facts.

Second. That the misrepresentation was made with knowledge of the facts.

Third. That the party to whom it was made was ignorant of the truth of the matter.

Fourth. That it was made with the intention that the other party should act upon it.

Fifth. That the other party was induced to act upon it, to his injury.

There is no doubt but that in a proper case this instruction would have been proper advice to the jury, but it must be obvoius that this instruction has no application to the facts in this case.

First. There is no evidence that Mary Opperman made any misrepresentation to your petioner. The evidence is that she endorsed and delivered the certificate to her husband.

Second. How can it be said that defendant was required to prove that Mary Opperman made the misrepresentation with knowledge of the facts.

There is no evidence that she made any representation to your petitioner in this matter, except metaphorically, of course, and to say that defendant was required to prove such facts was in fact an instruction to find for the plaintiff on this point.

Third. That the party to whom it was made was ignorant of the truth of the matter.

Now it may be suggested that the misrepresentations were made by Mary Opperman to her husband, Henry Opperman, and that any such statement so made to Henry Opperman was clearly known to him to be not true.

The true intent is probably that the wronged per-

son was the defendant, and if it were defendant, then it could be held that the defendant could be nothing but ignorant of the truth of the matters involved in misrepresentations it never had heard.

The point against the instruction is that the instruction has no application to the evidence in the case. It has relation to estoppel by active fraud, where the party charged was guilty of active fraud in making a false statement. The claim for the estoppel in this case is that the plaintiff by reason of her act in vesting the title to the stock in her husband was estopped to deny that the title to the stock passed to her husband.

It is the duty of the court to give to the jury only such instructions as are applicable to the evidence admissible under the issues, and to see that they are couched in such language so that they may not be misunderstood by the jury in applying the law to the facts as they may find them from the evidence.

Knapp v. *State*, 168 Indiana 153.

Hammond v. *Bookwalter*, 12 Indiana Appellate 177.

Point IX.

The court erred in its charge to the jury as set forth in Specification No. 6 of this brief.

This involves the sixth specification of error of this brief.

The charge complained of is as follows:

INSTRUCTION No. 12.

Given.

If you find from the evidence that the plaintiff, Mary Opperman, signed the assignment on the certificate of stock in question and delivered it to her husband for the sole purpose of having him deposit it with the defendant bank as security for a debt owing by her husband to the defendant bank and you further find that her said husband did deposit the certificate with the bank as security for his debt, then the transaction constituted a contract of suretyship on her part, as surety for her husband's debt. (P. R., p. 13.)

The petitioner contends that said instruction No. 12 given, is in effect that when the respondent signed and delivered the certificate, that she did not convey the legal title thereof, but conveyed to her husband the equitable title. That the construction of the congressional act in relation to stock in a national bank, similar to the conveyance in this case, vests in the transferee the legal or the entire title and that such method is to be encouraged as is well said by Judge Thayer, in the following language, viz:

> "It is a well known fact that stock certificates frequently circulate in places far remote from the home of the corporation by which they were issued, that in all commercial centers they are commonly transferred from hand to hand like negotiable paper, and that they are hypothecated for temporary loans by a simple indorsement and delivery thereof, the latter being perhaps the most common use to which such securities are put. In the great majority of cases, when stock is merely pledged for a loan, no record of the transfer is made on the books of the

corporation, and in the judgment of laymen the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public interest is best subserved by removing all restrictions against their circulation, and by placing them as nearly as possible on the plane of commercial paper."

Masury v. *Arkansas National Bank, et al.*, 93 Fed. 603.

Point X.

The Supreme Court of the State of Indiana erred when it decided that there was no error in the refusal to charge the jury, as requested in instruction No. 5, refused, and as set out in specification No. 5 of this brief.

This involves the Fifth specification of error of this brief.

The charge not given and complained of is as follows:

No. 5. The court instructs you that the provision in the assignment of the certificate, to-wit: "Transferable only on the books of the banks in person or by attorney on the surrender of this certificate," has no vitality or force whatever. (P. R., p. 16.)

Petitioner's contention in this instruction tendered and refused, was that the matter of transferring the stock on the books of the bank had nothing to do with the subject involved in the suit; that is to say, that the jury should not give that fact any

vitality or force whatever, for the reason that it was a matter of law for the court to decide and that it was of no concern that the assignment was not transferred on the books of the bank.

The delivery of the certificate, with the assignment and power endorsed, passes the entire title, legal and equitable, in the shares notwithstanding that by the terms of the charter or by-laws, the stock is declared to be transferable only on its books. Such provisions are only for the protection of the corporation and do not incapacitate the shareholder from parting with his interest, and his assignment, not on the books, passes his entire legal title in the stock.

McNeil v. *Tenth National Bank*, 46 New York 331.

Point XI.

The Supreme Court of the State of Indiana erred when it decided that there was no error in the refusal to charge the jury as requested in Instruction No. 18, refused, and set out in Specification No. 8 of this brief.

This involves the eighth specification of error of this brief.

The charge not given and complained of is as follows:

No. 18. I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to her husband or any other person. And if you find from the evidence

that she signed and executed a written assignment of said certificate of stock which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband took the same to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt. (P. R., p. 19.)

Exceptions were taken by petitioner to said instructions given and refused. (P. R., p. 10 (20).)

One of the contentions between the parties to this suit grew out of the claim that defendant had actual knowledge of the fact that Mary Opperman assigned this stock to her husband, that he may put up the same as collateral security.

Henry Opperman testified that he so informed Mr. Arnt and the latter testified that such was not done. That is it was contended by plaintiff and denied by defendant that Mr. Arnt had *actual* knowledge of this fact.

This instruction involves this question of knowledge by defendant and states the law as a result of defendant not having such knowledge.

It was a point in issue in the cause that defendant did not have any such knowledge. Under the evi-

dence submitted to the jury there was testimony both ways on this point. It was a question that was assigned to the jury. Should the jury have found from the evidence that defendant did not have such knowledge it should have been informed of the effect of such result, and not let the jury rest under the position of concluding that such fact made no difference in the case.

This point was not covered by any instruction given to the jury and the jury was left without any directions on this point.

Point XII.

The Supreme Court of the State of Indiana erred when it decided that there was no error in the refusal to charge the jury as requested in instruction No. 22, refused, and set out in specification No. 9 of this brief.

This involves the ninth specification of error of this brief.

The charge not given and complained of is as follows:

No. 22. A married woman cannot claim against the holder of collateral the rights of a surety when her husband had the title to the property that he placed in the hands of the defendant as collateral, and where there is nothing to put the holder of the collateral on notice of the wife's equitable interest in the property. (P. R., p. 20.)

Exception was taken by petitioner to said instruction refused. (P. R., p. 10 (20).)

It is petitioner's contention that:

In accordance with this case, it is now a well-established principle that where the true owner of property holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they have directly dealt, but they are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which he caused or allowed to appear to be vested in the party making the sale.

McNeil v. *Tenth National Bank,* 46 New York 325.

Bigelow on Estoppel, 2d Edition, p. 434.

And citations.

This rule applies to married women doing business for themselves under the statute.

Bodine v. *Killeen,* 53 New York 93.

Point XIII.

The Supreme Court of the State of Indiana erred when it affirmed the judgment of the nisi prius court of the State of Indiana.

This involves the tenth specification of error of this brief.

Your petitioner makes two points on this proposition:

(a) The verdict of the jury is not sustained by sufficient evidence.

(b) The verdict of the jury is contrary to law.

As to point (a):

The evidence is that respondent, Mary Opperman, was the owner of certificate No. 385, representing fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana; that she assigned to her husband, Henry A. F. Opperman, the said certificate of stock by endorsing the same in blank, that is signing her name to the printed assignment on the back thereof, and thereafter delivering the so endorsed certificate to her husband. There being no restrictions contained in such certificate of assignment; said assignment containing also a power of attorney in blank authorizing the transfer of the same on the books of said bank.

After such delivery to him so endorsed, the husband, Henry Opperman, put the same up as collateral security with your petitioner, Citizens Bank, of Michigan City, Indiana, as security for a loan by him at said Citizens Bank.

Mary Opperman as a witness at the trial, testified that her husband, at the time of the signing of such certificate, told her that he wished to put up the same as security and that he had discussed the matter with and told Mr. Arnt that he could get the said stock for such purpose, and that she so assigned the said stock for such purpose.

Of course, the real purpose of this testimony was to bring actual notice to the Citizens Bank of the fact that Mary Opperman was the owner of the said stock.

Your petitioner presents the claim that, though such testimony was admissible as a part of the res gestae, still it was not evidence of any probative value as to whether or not any such conversation was actually had between her husband and Mr. Arnt, so that as far as it may relate to your petitioner, this evidence was purely hearsay and is of no weight as to whether or not any such conversation was ever had; that as far as this testimony of Mary Opperman is concerned, the Citizens Bank had no notice of any such fact.

The statements made as a part of the res gestae are not admissible testimonially to prove the facts stated.

Bank v. *Kennedy*, 17 Wall. 19 (U. S.).
State v. *Horton*, 33 La. Ann. 289.
Appleton v. *State*, 61 Ark. 590.
Moses v. *Katzenberger*, 84 Ala. 95.

As evidence of facts, asserted as part of the res gestae, they are objectionable as hearsay and are to be excluded.

Pond v. *Okey*, 70 Iowa 244.

The words spoken were a part of the res gestae, it proved that the words were spoken. The words did not prove that the horse received the shock, only that it was said so.

Castner v. *Sliker*, 33 N. J. L. 507.

The husband, Henry Opperman, was a witness for respondent and as such a witness, he testified to an alleged conversation with Mr. Arnt in which he makes the statement that he, on one occasion, before the delivery of the stock certificate as such collateral, said the stock was his wife's.

Your petitioner claims that after the husband, Henry Opperman, had so put up the said certificate of stock with your petitioner as collateral security, then and after such fact it was not proper that the said Henry Opperman should be allowed to testify to any state of facts that had any tendency to defeat the title to the said stock so held by your petitioner through the said Henry Opperman; that it was not competent that anything should come from his mouth that was in any way in disparagement of his title to the said certificate of stock so put up by him as collateral security to his loan.

The questions were quite inadmissible as against the purchaser and assignee, since it was not shown to have had any notice of the conversation, and, therefore, in taking the certificate of stock, was only bound by the obligations imparted by the words in their ordinary commercial sense.

The Barnstable, 181 U. S. 464.

The statements of a holder of negotiable paper, made either before acquiring or after parting with title, are inadmissible.

Fisher v. *True*, 38 Me. 534.

It is proper to prove by parol the consideration of a mortgage, but it is not competent to contradict by parol, the conveying part of the instrument. There is a clear distinction between proving the consideration of a mortgage and proving by parol an agreement destroying the effect of the covenants contained in it.

Murdock v. *Cox*, 118 Ind. 266.

Parol evidence cannot be admitted to vary, contradict, add to, or control a deed or written contract.

The deed of bargain and sale, between these parties, had for its object the conveyance of certain land; and the extent of the land conveyed, the parties thereto, the estate conveyed thereby, and the covenants attending it, could not be affected by parol proof; and even that part which relates to the consideration, or the payment thereof, could not be contradicted or varied, by parol, so as in any way to affect the purpose of the deed that is, its operation as a conveyance.

Bever v. *North*, 107 Ind. 544.

Mr. Arnt was a witness at the trial and testified that said husband, Henry Opperman, said no such thing to him; that no such conversation was had between them.

It thus clearly shows that your petitioner had no notice of any claim of respondent, as owner of the said stock.

That on the facts in the case, there is no evidence as to any such notice and because of want of any such fact the plaintiff had failed on the facts involved and was not entitled to recover.

As to point (b):

There are two reasons why the verdict of the jury was contrary to law.

First. Under the facts in the case, the law sustains the claim that the respondent had divested herself of the title to the said certificate of stock and had vested the title to the same in her husband, Henry Opperman, and that the latter had good

right and legal authority to so put up the same as collateral security with your petitioner, Citizens Bank.

Succinctly stated, the facts are:

The respondent, Mary Opperman, was the owner of certificate No. 385, representing fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana; that there was a blank assignment and power of attorney printed on the back of this certificate; that respondent signed this blank without putting any restriction therein and in this condition handed the same to her husband, Henry Opperman; the latter thereafter took this certificate in such condition to the banking house of your petitioner, at Michigan City, Indiana, and put up the same as collateral security to a loan of his, with the bank.

The point is that this act of respondent vested the title to the stock in the husband and the putting up of the same as collateral vested the title in your petitioner as collateral to the said loan.

The transfer of stock by delivery of the certificate, endorsed in blank, or with power of attorney, passes title without transfer on the company's books, though the by-laws provide to the contrary, and the transferee may fill in the blanks, and it may be filled in with the name of a remote transferee; the name inserted being immaterial to the transferror.

McCarthy v. *Crawford*, 238 Ill. 380.

Second. A further reason why the said verdict of the jury is contrary to law, is because of the great confusion in the instructions given by the trial court to the jury on the trial of the cause.

The confusion is apparent in the language used in the several instructions.

The Instructions Numbers 4, 12, 14, given at the request of plaintiff in each case, bear on the point with relation to when a married woman pledges her property for the debt of another, she is a surety, and is not liable.

These instructions totally ignore the undisputed fact that plaintiff executed the assignment without any restrictions and delivered the same at her home to her husband and the latter took them to the bank and there placed them with the bank as collateral with his loan.

The instructions requested by defendant, numbered 12 and 14, given by the court, places the burden of showing that defendant had knowledge of the plaintiff's intent in the said certificate on the plaintiff while the instruction requested by plaintiff numbered 5, given by the court, places this same burden on the defendant.

And again the state of facts set up says in the instructions numbered 4, 12, 13, requested by plaintiff and given by the court, says the plaintiff was a surety and as such the assignment was void and the verdict ought to be for the plaintiff; while the same state of facts in instructions numbered 1 and 4, requested by defendant and given by the court, state that plaintiff is estopped to claim ownership to the said certificate.

The isntructions numbered 4, 12, 13, requested by plaintiff and given by the court, state that if the assignment was for security then respondent was a

surety and as such, the assignment was void and plaintiff was entitled to recover.

While instructions numbered 6, 11, 15, 20, requested by defendant and given by the court, stated the assignment of the certificate could be made in blank and the delivery of such to defendant without notice, the defendant was entitled to recover.

An instruction omitting a necessary element of defendant's liability to plaintiff, could not be cured by another instruction correctly stating the law.

Steele v. *Michigan Company,* 50 Indiana Appellate, 635.

Where the charges to the jury are inconsistent and tend to confuse the jury as to the law of the case, the cause will be reversed.

Smith v. *Rodecap,* 5 Indiana Appellate 78.

Where two or more instructions are inconsistent and calculated to mislead the jury, or leave them in doubt as to the law, it is cause for reversal.

Pittsburgh Co. v. *Noftsger,* 148 Indiana 101.

The court cannot, by contradictory instructions leave to the jury the duty of determining which of the two lines of instructions shall be followed, or what rule of law shall control the case.

Fowler v. *Wallace,* 131 Indiana 347.

Who can say the harm that was done by the jury in reaching its verdict under such instructions. How could they find the merits of this controversy, find estoppel under the definition given by the court to guide them in this case, to dispose of the question of

the wife being a surety, to dispose of the question of the passing of the title to the certificate of stock, to pass upon the effect of her signing the said certificate and delivering the same to her husband under the instructions of the court, to decide the merits of this controversy under the issues and the evidence in the cause, by the advice of the Instructions of the Court? What could twelve average intelligent men have done?

PART TWO.

To substitute the transcript and printed record filed in return to the Writ of Error, for the return of the Writ of Certiorari.

This petitioner has set forth in the petition for a Writ of Certiorari, a statement showing its acts in bringing this cause in this court for a review, and believes that its neglect in not properly presenting the cause for review is excusable as set forth in said petition, and believes that this court should so consider it and allow the Writ of Certiorari, and to avoid the delay and expense that it ought to grant the prayer to substitute the transcript that was filed in response to the Writ of Error.

Section 6 of the Circuit Court of Appeals Act, provides, "It shall be competent for the Supreme Court to require by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

This statute, giving the Supreme Court jurisdiction and a right to correct errors in cases from the Circuit Court of Appeals. Congress has extended to the Supreme Court similar rights and duties and jurisdiction in the amendment of September 6, 1916, of Section 237, of the Code, which reads as follows:

> "It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like

effect as if brought up by Writ of Error, * * * where any title * * * is claimed under any statute * * * and the decision is * * * against the title especially set up or claimed, by either party, under such * * * statute * * *."

And by authority of Section 4 of said Act of September 6, 1916, it seems that Congress gave authority to this Honorable Court to do the thing that is prayed for and is desired by this petitioner to disregard the said Writ of Error and to take the action that would be appropriate, which said Section 4 reads as follows:

Sec. 4. That no court having power to review a judgment or decree rendered or passed by another shall dismiss a Writ of Error solely because an appeal should have been taken, or dismiss an appeal solely because a Writ of Error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed.

Where a case is properly in this court, it has a right to issue any writ which may be necessary to render its appellate jurisdiction effectual.

The Milwaukee, etc., Railroad Company, 5 Wallace, 188.

The complainant had a decree in the Circuit Court, and this was modified in certain particulars, to which we shall presently refer, by the Circuit Court of Appeals. The complainant then appealed to this court, and motion was made to dismiss the appeal, it being urged that the decree below was not final. Complainant then petitioned for a Writ of Certiorari,

and this writ and a cross-writ asked for by the respondent were granted.

Baglin v. *Cusenier Company,* 221 U. S. 580.

On appeal, the Circuit Court of Appeals reversed the decree of the Circuit Court for want of jurisdiction in that court over the subject matter and because of the absence of necessary parties, who, if made parties, would oust the court of jurisdiction; and the cause was remanded, with directions to dismiss the bill, at the cost of complainants.

60 C. C. A. 347; 125 Fed. 657.

The cause was appealed to this court. Following the filing of a motion to dismiss such appeal, an application was made on behalf of the complainants below, for the allowance of a Writ of Certiorari, and the determination of these two motions was postponed to the hearing on the merits.

From this it follows that the motion to dismiss must prevail. But we are not thereby relieved of the duty of considering the correctness of the decree of the Circuit Court of Appeals, because, in our opinion, the case is one in which the Writ of Certiorari should be allowed. We therefore dismiss the appeal, and grant the application for Certiorari, treating the record filed on the appeal as a return to that writ.

O'Callaghan v. *O'Brien,* 199 U. S. 89.

The plaintiff obtained a judgment in the Circuit Court, and that judgment was affirmed by the Circuit Court of Appeals for the eighth circuit. The case is reported in 43 C. C. A. 594, 104 Fed 380. The

cause was then brought here by a Writ of Error. We think the proper course was to have asked for a Writ of Certiorari to bring the final judgment of the Circuit Court of Appeals here for review. However, under the powers possessed by us, under the judiciary act of March 3, 1891, we now allow a Writ of Certiorari, and direct that a copy of the record heretofore filed under the Writ of Error shall be taken and deemed as a sufficient return to the Certiorari.

Security Trust Company v. *William H. Dent,* 187 U. S. 237.

A Writ of Certiorari to the Circuit Court of Appeals may be allowed by the Supreme Court of the United States under the judiciary act of March 3, 1891, where the cause has been improperly brought up by Writ of Error; and in such case the copy of the record filed under the Writ of Error may be directed to be taken and deemed a sufficient return to the Certiorari.

Security Trust Company v. *William H. Dent,* 187 U. S. 237.

From this judgment, the Pullman Company appealed directly to this court. It also appealed to the Circuit Court of Appeals. The case was there argued upon a motion to dismiss the appeal, and the motion denied, and the further argument was postponed until some disposition was made of the appeal taken directly to this court.

39 U. S. App. 307.
22 C. C. A. 246.
76 Fed. 401.

A motion has also been made to this court to dis-

miss the appeal, and thereupon an application was made to us for a Writ of Certiorari to the Circuit Court of Appeals for the third circuit; and, on account of the peculiar circumstances, it was granted, and the record has been returned to this court by virtue of that writ.

Whichever route may be the correct one, either directly from the Circuit Court or through the Circuit Court of Appeals, it is unnecessary to decide, because the case is now properly before us either by appeal or by the Writ of Certiorari, and we therefore proceed to determine it upon the merits.

Pullman's Palace Car Co. v. *Central Transp. Co.*, 171 U. S. 138.

We have considered the suggestion that, if the appeal should be dismissed, a Certiorari should be granted, but we are of the opinion that no ground is shown for the issue of the writ.

Duryea Power Company v. *Sternbergh*, 218 U. S. 299.

Certiorari to the Circuit Court of Appeals will be allowed by the Federal Supreme Court, where the importance of the case demands it, to avoid any question as to the jurisdiction of the Supreme Court of a Writ of Error duly allowed, where an application for Certiorari was made after a motion to dismiss the Writ of Error was filed.

Montana Mining Co. v. *St. Louis M. & M. Co.*, 204 U. S. 204.

The question before us is whether this appeal was properly granted and can be maintained. In all

cases where the decree or judgment of the Circuit Court of Appeals is made final by the statute, an appeal does not lie, but any such case may be brought here "by Certiorari or otherwise."

Huguley Mfg. Co. v. *Galeton Cotton Mills,* 184 U. S. 290.

Said petitioner shows that no harm will be done said respondent for the reason that this petitioner has heretofore executed a good and sufficient bond for a supercedeas in this cause. That the said respondent has filed no pleading or motion of any character in this cause and has filed no request for any action of the court in the premises.

Public Interest. The question involved in this review is of public interest in so far as the commercial world is concerned as is well said by Circuit Judge Thayer in the following words:

> "It is a well-known fact that stock certificates frequently circulate in places far remote from the home of the corporation by which they were issued, that in all commercial centers they are commonly transferred from hand to hand like negotiable paper, and that they are hypothecated for temporary loans by a simple indorsement and delivery thereof, the latter being perhaps the most common use to which such securities are put. In the great majority of cases, when stock is merely pledged for a loan, no record of the transfer is made on the books of the corporation, and in the judgment of laymen the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public inter-

issued, and the other things therein prayed for be done, as in the said petition prayed.

JEREMIAH B. COLLINS,
WORTH W. PEPPLE,
Counsel for Petitioner.

Received a copy of the foregoing notice and of the petition for Certiorari and brief referred to therein, this ..... day of March, 1918.

....,
Counsel for Respondent.

STATE OF INDIANA,
COUNTY OF LAPORTE. } ss.

On the .12th. day of March, 1918, I served the within notice on Mary Opperman, by handing a copy of the said petition and brief to her, at No. 131 West Second street in the City of Michigan City, Indiana.

GEORGE L. WEST.

Subscribed and sworn to before me this .12th. day of March, 1918.

CORNELIUS R. COLLINS,
Notary Public.

My Commission Expires, September 5, 1919.

Office Supreme Court, U. S.
FILED
MAR 28 1918
JAMES D. MAHER,
CLERK.

No. 284

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

CITIZENS BANK OF MICHIGAN CITY, INDIANA,
Plaintiff in Error,

vs.

MARY OPPERMAN,
Defendant in Error.

IN ERROR TO SUPREME COURT OF STATE OF INDIANA.

PETITION FOR AN ANCILLARY WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

WORTH W. PEPPLE,
JEREMIAH B. COLLINS,
COUNSEL FOR PLAINTIFF IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

No. 610.

CITIZENS BANK OF MICHIGAN CITY, INDIANA,
Plaintiff in Error,
vs.
MARY OPPERMAN,
Defendant in Error.

IN ERROR TO SUPREME COURT OF STATE OF INDIANA.

PETITION FOR AN ANCILLARY WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

To the Honorable Justices of the Supreme Court of the United States:

The petition of the Citizens' Bank of Michigan City, Indiana, plaintiff in error, respectfully shows to this honorable court, as follows:

1st. That on the 6th day of August, 1907, the Supreme Court of the State of Indiana, filed a transcript in this court, pursuant to a writ of error issued by this honorable court; that the said cause is now pending in this court upon said writ of error; that the said transcript is incomplete in that the clerk of the Supreme Court of the State of Indiana prepared,

transcribed, and filed the same agreeable to the praecipes filed in his office by the said plaintiff in error and the said defendant in error, and not otherwise. That the said transcript does not contain all of the proceedings in the Supreme Court of the State of Indiana, for the reason that they were not required by the parties hereto, in the said praecipes.

2d. That the diminution of the record can be supplied as it is a part of the records of the said Supreme Court of the State of Indiana; that the said additional record is necessary to be filed with the transcript in this case for the reason that the said plaintiff in error is about to file a petition for a *certiorari* under Section 237 as amended on September 6, 1916, all that the rules of this court require that the entire transcript of record of the case shall be filed with such application. That said plaintiff in error alleges that there is no substitute remedy for it excepting that of applying for this ancillary writ of *certiorari*, as it being necessary to have an entire transcript of record of the said Supreme Court of the State of Indiana, in order to properly present its petition for said writ of *certiorari*.

3d. That the said amendment to the said transcript is prepared by the clerk of the said Supreme Court of Indiana and is in the possession of the clerk of this court and is ready to be filed at the court's instance; and will not cause any delay in the reviewing of said cause by this court. That this present term, October Term, 1917, is the first term of the entry of this case.

4th. The said plaintiff in error has fully and fairly stated the matter of the filing of this motion,

to its counsel, and that it is advised by its said counsel and verily believes to be true, that it has good grounds for making the said application for the said ancillary writ of *certiorari*.

5th. The granting of the writ herein prayed for will not occasion any delay or detriment to the said defendant in error; that said defendant in error has made no motion or filed any pleading of any character in the said cause.

Wherefore your petitioner prays that an ancillary writ of *certiorari* may be issued out of and under the seal of this court, directed to the Supreme Court of the State of Indiana, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of all and every part of the record and proceedings of the said court in the case therein entitled *Citizens' Bank of Michigan City, Indiana* v. *Mary Opperman*, No. 22832, remaining on file in the office of the clerk of said court, and not embodied in the transcript on the writ of error in said cause already filed in this court, and when so filed, the said transcript be printed under the supervision of the clerk of this court in accordance with the rules of this honorable court.

THE CITIZENS' BANK OF MICHIGAN CITY, INDIANA,
Plaintiff in Error.

By JEREMIAH B. COLLINS,
Attorney for Said Plaintiff in Error.

UNITED STATES OF AMERICA,
STATE OF INDIANA,
COUNTY OF LA PORTE. } ss.

Jeremiah B. Collins, being duly sworn, says that he is one of the counsel for the said Citizens' Bank of Michigan City, Indiana, the petitioner, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

JEREMIAH B. COLLINS.

Subscribed and sworn to before me by the said Jeremiah B. Collins, this 8th day of March, A. D. 1918.

JAMES P. KENNEFICK,
Notary Public in and for Said County and State.

My commission expires,
3-2-1919

We hereby certify that we have examined the foregoing petition and in our opinion the petition is well founded and the matter is one in which the prayer of the petition should be granted.

JEREMIAH B. COLLINS,
WORTH W. PEPPLE,
Counsel for Said Plaintiff in Error, the Petitioner.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1917, No. 610.

Citizens Bank of Michigan City, Indiana, *Plaintiff in Error,* *vs.* Mary Opperman, *Defendant in Error.*	Notice on Petition for Ancillary Writ of Certiorari, Directed to the Supreme Court of the State of Indiana.

To Samuel Parker, Counsel for the Above Named, Mary Opperman, Defendant in Error; and to the Above Named, Mary Opperman, Defendant in Error:

Please take notice that we shall, on or before the 18th day of March, 1918, file in the office of the clerk of the United States Supreme Court, the foregoing petition for an ancillary writ of *certiorari,* together with that portion of the record mentioned in said petition in the above entitled cause, and that we shall, on Monday, the 8th day of April, 1918, upon the opening of court, or as soon thereafter as counsel can be heard, at the court room, of the Supreme Court of the United States, move that the ancillary writ of *certiorari,* be issued as in said petition prayed.

JEREMIAH B. COLLINS,
WORTH W. PEPPLE,
Counsel for Said Plaintiff in Error, the Petitioner.

Received a copy of the foregoing notice and of the petition for ancillary writ of *certiorari,* this ..... day of March, 1918.

....,
Counsel for Said Defendant in Error, the Respondent.

STATE OF INDIANA,
COUNTY OF LA PORTE. } ss.

On the 12th day of March, 1918, I served the within notice on Mary Opperman, by handing a copy of the said petition and brief to her, at No. 131 West Second street in the City of Michigan City, Indiana.

GEORGE L. WEST.

Subscribed and sworn to before me this 12th day of March, 1918.

CORNELIUS R. COLLINS.
Notary Public.

My commission expires September 5, 1919.

Office Supreme Court, U. S.
FILED
APR 5 1918
JAMES D. MAHER,
CLERK.

No. ~~610~~ 234

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

CITIZENS BANK OF MICHIGAN CITY, INDIANA,
Petitioner,

vs.

MARY OPPERMAN,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL PARKER,
Counsel for Respondent.

F. E. OSBORN,
W. G. CRABILL,
S. J. CRUMPACKER,
Of Counsel.

TRIBUNE PRINTING CO., SOUTH BEND, IND.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 610 (26,077)

CITIZENS BANK OF MICHIGAN CITY, INDIANA,

Petitioner,

vs.

MARY OPPERMAN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, Mary Opperman, respectfully shows to this Honorable Court:

THE CASE.

On September 19, 1904, respondent was the owner of the certificate of bank stock in question. Her husband was indebted to petitioner. Petitioner asked for security. The husband stated that he could put up respondent's certificate of stock, went to respondent, procured the certificate and deposited it as security for his own debt.

Section 7855 Burns Revised Statutes of Indiana, provides "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract as to her, shall be void."

Respondent brought this action, in 1905, to recover possession of her certificate. The verdict of the jury was that she should recover the certificate. Judgment followed the verdict and the Supreme Court of Indiana ruled with the action of the lower court.

QUESTIONS INVOLVED.

I. The application for writ of certiorari was not made in time.

II. There is no legitimate excuse for asking this court to exercise a discretion and to issue a writ.

III. The decision of the Supreme Court of Indiana is not subject to review.

POINTS AND AUTHORITIES.

I.

Final action in this cause, by the Supreme Court of Indiana, was entered on May 18th, 1917. The petition for certiorari was filed about ten months later, or in March, 1918.

A writ of certiorari to review a judgment of the highest court of a state must be sued out within three months from the date of entry of the judgment or decree.

Section 1228 a, Act Sept. 6, 1916, c 448, Sec. 6.

II.

A writ of certiorari is not issued as a matter of right. The issuance of it rests in the discretion of the Supreme Court, and it is granted only in cases of gravity and importance. It is a power sparingly exercised.

Philadelphia & Reading Coal & Iron Co. vs. Gilbert, 38 Sup. Ct. Rep. 58, (Decided Nov. 1917).

II a.

This cause has been in the courts since July 27, 1905. The Appellate Court of Indiana, on November 5, 1908, found the evidence to be sufficient to sustain a finding for the present respondent (44 Ind. App. 401). A re-hearing was denied on June 25th, 1909, and the Supreme Court of Indiana refused to transfer the cause on October 15th, 1909. On the 13th day of February, 1917, the Supreme Court of Indiana rendered its decision in this cause in which it found that the judgment in favor of the present respondent was supported by the evidence. On May 18th, 1917, the Supreme Court of Indiana again affirmed the former decisions by overruling the petition of the present plaintiff in error, or petitioner, for a rehearing. Under these circumstances the petition for a writ of certiorai should be denied. The assertion of a Federal right must not be frivolous. It must at least have fair color of support, and must not be invoked for purposes of delay.

Eichel et al. vs. United States Fidelity & Guaranty Co., 38 Sup. Ct. Rep. 47 (Decided Oct. 8th, 1917).

Frank P. Chesborough vs. Frank T. Woodworth, 37 Sup. Ct. Rep. 579, (Decided May 21st, 1917).

III.

Where, as here, the decision of the State court is based on a doctrine of general law sufficient of itself to determine the case, there is no jurisdiction to review.

Anthony F. Seeberger vs. Leander J. M. McCormick, 20 Sup. Ct. Rep. 128, s. c. 175 U. S. 274.

Eustis vs. Bolles, 150 U. S. 361, 366, s. c. 14 Sup. Ct. Rep. 131.

Lessassier et al. vs. Kennedy, 123 U. S. 521, s. c. 8 Sup. Ct. Rep. 244.

Capital National Bank of Lincoln, Neb. vs. First National Bank of Cadiz, Ohio, 172 U. S. 425, s. c. 19 Sup. Ct. Rep. 202.

Section 44 of Chapter 9, Zolines Fed. Appellate Jurisdiction and Procedure.

ARGUMENT.

I.

The petitioner admits, in its brief, (Paragraph sixth clause b. page 5), that the final action of the Supreme Court of Indiana was entered on May 18th, 1917. This petition was filed in March, 1918, or ten months after the action of the Indiana court. The Act of September 6th, 1916, requires that a petition for a writ of certiorari must be filed within three months from the date of the decision of the state court. The petition therefore comes too late.

II.

This action was originally instituted July 27, 1905. (See petitioner's brief p. 2 par. 1). Since

that time it has been before the Appellate Court of Indiana (44 Indiana Appellate 401, when the court found that the evidence was sufficient to warrant a finding against the present petitioner. A re-hearing was denied. A petition to transfer to the Supreme Court of Indiana was denied. There was a re-trial in the St. Joseph Superior Court (See printed transcript of record p. 20), when the jury returned a verdict for respondent. Judgment followed the verdict. On the second appeal the Supreme Court of Indiana again found, (Printed Tr. pp. 120 to 125), that the evidence was sufficient to warrant a judgment in favor of respondent. The court said in part:

"The remaining assignment of error, in overruling the motion for a new trial, is that the verdict of the jury is not sustained by sufficient evidence. No point on this assignment is made in Appellant's brief. The record discloses, however, very little dispute as to any material fact, except as to whether defendant was informed by plaintiff's husband before he procured and pledged the stock that the stock belonged to his wife. There was evidence that the defendant was so informed, and this was denied by Appellant's cashier. There was sufficient evidence pro and con, to raise an issue of fact, and this issue was settled by the jury in favor of the plaintiff. Under the well settled rule this court cannot reverse the judgment on this assignment. . . ."

The Supreme Court of Indiana thus found that there was evidence sufficient to warrant the jury in finding that petitioner took the certificate of stock in question with knowledge that it belonged to respondent. Then there is no innocent purchaser for value concerned in this cause, and the petitioner's "Questions Involved" (See its brief pp. 29

to 31) are each and all mere attempts to induce this court to again weigh the evidence. The facts necessary to present the "Questions" stated by petitioner were found to not exist. What construction should be given to the National Bank Act was not before the Indiana courts, because the jury found that petitioner knew who owned the certificate of stock that was pledged as security.

That this finding of the jury was based on the evidence is clear as seen by reference to the following bit of evidence taken from the testimony of Henry Opperman, respondent's husband, who pledged the certificate;

q. "What did you say to him, (petitioner's cashier, Charles E. Arnt) or he to you about what security you might put up?"

a. "I told him I thought I might get my wife's bank stock to put up as security."

q. "When you told him you might possibly get your wife's bank stock, what did he say?"

a. "He said all right."

q. "When you told him that you thought possibly you might get your wife's bank stock and he said that would be all right, what else did he say about getting it, if anything?"

a. " 'Well, get it and put it up for security'."

q. "Did he say that?"

a. "Yes, and I got the stock and put it up for the debt I owed him." (Printed transcript pp. 48 and 49).

"The assertion of a Federal right must not be frivolous or wholly without foundation. It must at least have fair color of support, for otherwise an utterly baseless Federal right might be set up or

claimed in almost any case, and the jurisdiction of the United States Supreme Court invoked merely for purposes of delay." (Zohines' Fed. Appellate Jurisdiction and Procedure p. 150 Sec. 50).

At the risk of being tedious and of seeming to be petulent respondent would respectfully call attention to the following extract taken from the amended second paragraph of petitioner's answer: —"and that at said time the said Henry A. F. Opperman (respondent's husband) represented to defendant that he was the owner of said certificate and defendant had no notice or knowledge that plaintiff had or claimed to have any interest in said stock certificate." (P. Rec. p. 5). Compare this allegation with the evidence above referred to, and with the answers of the jury to the following interrogatories:

No. 81. "Did the defendant at the time it accepted said certificate of stock believe that said certificate of stock was owned by the plaintiff's husband, Henry Opperman?"

Ans. "No."

No. 84. "Did the defendant bank and its officers in accepting the certificate of stock involved in this suit as collateral or as security for the payment of the debt or debts of the husband of the plaintiff have good reason to believe that Henry Opperman was the owner of said certificate?"

Ans. "No."

No. 9. "Has Charles E. Arnt known for approximately twenty years that the plaintiff, Mary Opperman, and Henry A. F. Opperman, were husband and wife?"

Ans. "Yes."

No. 61. "If your answer to the last foregoing interrogatory is Yes, then answer this one: "Did said Charles E. Arnt, with either a pencil or a pen, make an X at the place on the blank assignment on the bank of said certificate of stock mentioned in Interrogatory No. 40 at the place where he desired Mary Opperman to sign her name?"

Ans. "Yes."

No. 6. "Was Charles E. Arnt, cashier of the defendant, Citizens Bank of Michigan City, during the year 1904 and 1905?"

Ans. "Yes." (Interrogatories P. Tr. pp. 22 to 29).

The record discloses that the defense in this case was estopped. That is that the respondent was estopped to assert her rights because petitioner took the certificate in question without notice of respondent's interests. The evidence disclosed, and the jury found, that petitioner took with notice. Whether petitioner knew of, or did not know of, respondent's interest is not a question that has reference to a title, right or privilege claimed under a statute of the United States. If by requesting an instruction that has no application to the issue in the cause, jurisdiction can be conferred on the United States Supreme Court, then all cases may be taken to that court.

Respondent respectfully urges that this court should not in its discretion issue a writ of certiorari in this cause.

III.

The decision of the Supreme Court of Indiana, set out printed record pp. 120 to 125, is not based

on or under a statute of the United States. The decision speaks for itself on this point, and that part thereof that concerns this question is as follows, to-wit:

"Another ground of objection to several of the above items is that the plaintiff should not be permitted to deny the purpose and meaning of her written power of attorney and assignment of the stock. The form of the wife's signed instruments in such cases does not prevent her from showing the real facts and the actual substance, subject to the grantees right to show estoppel. Much more positive and expressive is a signed and delivered deed of conveyance, and yet the same may be shown to be a mortgage. Creighton vs. Hoppis, supra; Webb vs. John Hancock Insurance Co., 162 Ind. 616.

Therefore, the rule that, under the construction by the Federal Courts of the Federal National Bank Act, an assignment of a certificate of National Bank stock without transfer on the books of the banking corporation is a complete transfer, vesting title in the transferee, is not in point. Even though the transfer had been made on the bank's books, the plaintiff might, inasmuch as substance and not form is regarded, show that the certificate was her property, and the completeness of the transfer, whether by assignment only or by an entry on the books of the corporation would be pertinent only to the issue of estoppel. Where, upon all the facts being shown, it appears that the wife has absolutely and completely parted with her title by an executed arrangement, and that nothing remains in her contingent upon her husband paying his debts, her conveyance or assignment will be binding upon her, though the purpose of so doing was the actual

paying of her husband's debts. Rogers vs. Shewmaker, 27 Ind. App. 631.

It will be noted in the case last above cited, and relied upon by Appellant, that the wife not only completely and without contingency or condition parted with her title at the time she executed the conveyance in question, but that the property had been actually used for the payment of her husband's debts, and that quite a number of years had elapsed before she sought to set aside the conveyance.

But where the fact is that the wife simply pledges her property to be used or returned, or released, contingent upon the default or payment by her husband of his debts, the arrangement is not an absolute or complete parting with her title, though the face of the papers signed by her may so indicate. McCoy vs. Barnes, 136 Ind. 378.

Therefore there was no error in overruling Appellant's objections, so far as the last stated ground of objection is concerned."

It is apparent that the Indiana Court expressly refrained from uselessly injecting a question under a Federal Statute into its decision, and based its opinion on general law wholly apart from petitioner's alleged point.

It is now apparent that petitioner has abandoned its writ of error, and seeks a review solely by means of a writ of certiorari. A writ of error, as respondent understands, is mandatory when properly invoked, while a writ of certiroari is discretionary at the most. In seeking to invoke the discretion of this court it does not present a case that respondent feels should appeal to the court, and certainly does

not present a case that discloses an infringement of its federal rights.

For each of the reasons herein set out, respondent respectfully asks that the petition for a writ of certiorari be denied, and that this cause be dismissed.

Respectfully submitted,

Samuel Parker

Attorney for Respondent.

F. E. OSBORN,
W. G. CRABILL,
S. J. CRUMPACKER,
Of Counsel.

No. 284

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1917.

[redacted] (26,077).

CITIZENS BANK OF MICHIGAN CITY, INDIANA,
Plaintiff in Error,

vs.

MARY OPPERMAN,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

Brief for Plaintiff in Error.

WORTH W. PEPPLE,
JEREMIAH B. COLLINS,
ATTORNEYS FOR PLAINTIFF IN ERROR.

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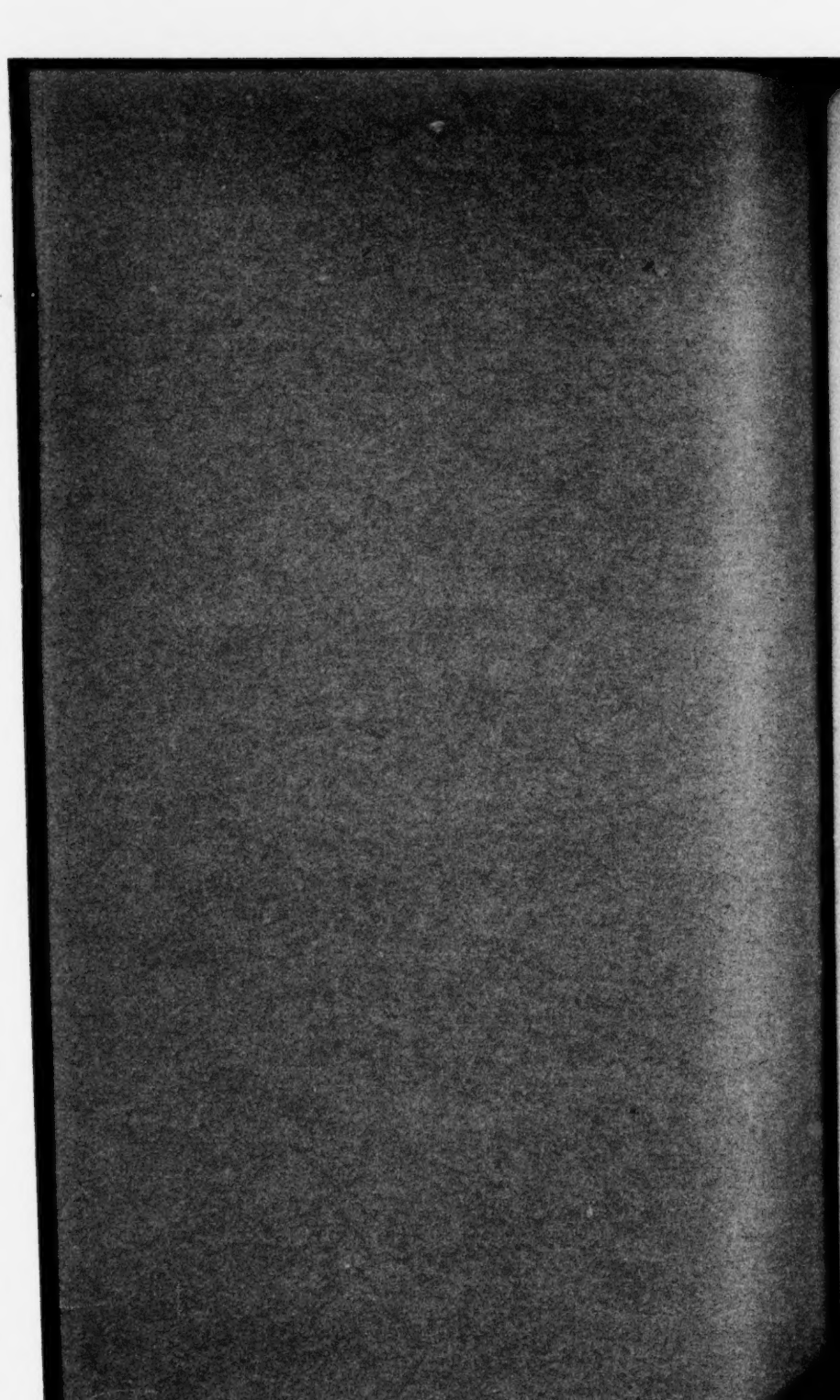

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

No. 610 (26,077).

CITIZENS BANK OF MICHIGAN CITY, INDIANA,
Plaintiff in Error,
vs.
MARY OPPERMAN,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement of the case.

(a)

This was an action of replevin brought by defendant in error in the state court of the State of Indiana, by a complaint in law in replevin, for the possession of 15 shares of stock in the First National Bank of Michigan City, a corporation organized under the United States national banking laws. (P. R., p. 2.)

(b)

To this complaint the plaintiff in error filed an answer in two paragraphs, first a general denial. (P. R., p. 4.)

Amended second paragraph of answer, that said defendant in error did, on about September 19, 1904, make an assignment to her husband of a certain certificate of stock in a national banking association, organized under the laws of the United States; that such assignment was made on the blank form on the back of such certificate and was as follows:

> "For value received ..... hereby sell, transfer and assign to ..... the shares of Stock within mentioned and authorize ..... to make the necessary transfer on the books of the bank.
>
> Witness ..... hand and seal this ..... day of ....., 190...
>
> MARY OPPERMAN.

The said defendant in error executed an assignment on the back of such certificate of stock and after so doing delivered it to her husband. Her husband then delivered it to the plaintiff in error as collateral to secure the payment of certain indebtedness due from the husband to the said plaintiff in error. After the husband delivered the said certificate of stock to the said plaintiff in error, the said plaintiff in error then gave to the husband several extensions of time on several notes owed by the husband to the plaintiff in error.

That said assignment so made contained no restrictions whatever.

That thereafter the said Henry Opperman became insolvent, made an assignment, under the laws of Indiana, of all of his property for the benefit of his creditors, and has since and continues to be and remains insolvent and your plaintiff in error cannot make anything in its said claims, the said notes to which the said certificate of stock was so put up as collateral security.

That the said certificate of stock represented stock of said First National Bank; that the same was a corporation organized and doing business under the national banking laws of the United States; that under such laws the said stock was properly assigned and the title thereof vested in the said Henry Opperman, and that the latter had a good legal title thereto, and was able to assign the same as collateral security as aforesaid. (P. R., p. 5.)

(c)

To this amended second paragraph of answer the said respondent filed a demurrer for want of facts, which was sustained by the court, to which ruling the petitioner excepted and refused to plead further. (P. R., p. 8.)

(d)

On the issues so formed, by said complaint, and said answer in general denial, the cause was submitted to a jury for trial. (P. R., p. 22.)

(e)

Upon the issues so joined, the case came on for trial before a jury duly empaneled in said *nisi* court.

The defendant in error, being the plaintiff below, to sustain her issues, examined several witnesses, which several witnesses gave testimony over the objections of this petitioner, in the following manner, to wit:

HENRY A. F. OPPERMAN:

Q. Who, if anybody, gave her any directions as to writing her name on it? (P. R., p. 59 (99)).

A. I did; or rather I was directed to tell her.

Q. Now, Mr. Opperman, at the time you gave this certificate of stock, which I believe is mentioned in this collateral agreement as certificate number 385, did you receive any money from the Citizens Bank?

A. No.

Q. Did your wife receive any money at that time?

A. No, sir. (P. R., p. 53 (104).)

Q. Now, did you get any other money than those items you have mentioned, from the bank?

A. That is all. (P. R., p. 55 (107).)

Q. At the time that you got this certificate of stock from your wife did you give her any money or anything else for it?

A. I didn't. (P. R., p. 55.)

Q. At the time that you got this certificate from your wife and gave it to Mr. Arnt at the Citizens Bank did your wife receive anything from the bank for it?

A. No. (P. R., p. 55.)

Q. Was this money that you borrowed of the Citizens Bank and for which the stock was put up as

collateral used, or any part of it used to pay any debt of your wife's?

A. It was not. (P. R., p. 56.)

Q. Was this money which you borrowed of the Citizens Bank and for which this stock was put up as collateral, or any part of it, used to pay for any property of your wife's or that she bought or that was bought for her?

A. It was not. (P. R., p. 56.)

Q. Do you know where your wife got that stock?

The defendant objects to the question as not being material in this case, the question at issue here being the title to the stock.

A. Yes. (P. R., p. 56.)

(f)

MARY OPPERMAN:

Q. And where was that certificate at that time?

A. Upstairs in the bedroom—my bedroom.

Q. And when he asked you for it did he tell you what he wanted to do with it?

A. Yes. (P. R., p. 65.)

Q. What did he say that he wanted with it?

A. As security. (P. R., p. 65 (123).)

Q. What, if anything, did he say at that same time as to where or with whom he was going to use it as security?

A. Yes, he did. (P. R., p. 66 (125).)

Q. Notice the question, Mrs. Opperman; what, if anything, did he say?

A. He said he wanted it as security to a loan of some money at the Citizens Bank.

Q. And when he brought it back what did he say to you about the way you had signed it?

A. That I hadn't signed it in the right place.

Q. Did he ever, at any time, give you any money or anything else for it?

A. No. (P. R., p. 67 (128).)

Q. Did the Citizens Bank ever give you any money for this certificate?

A. No.

Q. Did you ever receive any money from the Citizens Bank at the time, or after you let your husband have that certificate?

A. No, I never got any money from them. (P. R., p. 67.)

(g)

CHARLES E. ARNT:

Q. And it was never transferred on the books of the First National Bank from Mrs. Opperman's name, either, was it?

A. Not to my knowledge. (P. R., p. 72 (134).)

(n)

Upon the issues on the said complaint and an answer in general denial, the jury on the 18th day of January, 1913, returned a verdict against the said petitioner to the effect that she was the owner and entitled to the possession of the said certificate of stock, and that the defendant unlawfully detains the same and that the value thereof is thirty-one hundred fifty dollars ($3,150). (P. R., p. 22.)

(o)

That upon the said verdict, the court rendered judgment. (P. R., p. 30.)

(p)

That thereafter on the 31st day of January, 1913, the said petitioner filed its motion for a new trial. (P. R., p. 39.)

(q)

And thereupon on the 29th day of May, 1913, the said motion for a new trial is overruled and the defendant was given exceptions. (P. R., p. 45 (91).)

(r)

And thereupon on the 10th day of September, 1913, the said cause is submitted to the Appellate Court for judgment and decree. (P. R., p. 119 (218).)

(s)

And afterwards on the 26th day of May, 1915, the Supreme Court of the State of Indiana transfers said case to the Supreme Court of the State of Indiana. (P. R., p. 119.)

(t)

And thereafter said Supreme Court of the State of Indiana in an opinion announced its decision in said cause and affirmed the judgment in the trial court below. (P. R., p. 120 (225).)

(u)

And thereafter, within due time, on the 12th day of April, 1917, the said petitioner filed its petition for a rehearing. (P. R., p. 126.)

(v)

And that thereafter on the 18th day of May, 1917, the said Supreme Court of the State of Indiana, overruled the petition for rehearing. (P. R., p. 127 (242).)

(w)

That thereafter the said petitioner filed its petition for a writ of error to this court. (P. R., p. 132.)

II.

Questions involved.

1. The questions involved are whether an assignment of the certificate of stock in a national banking corporation, organized under the laws of the United States, before it conveys the legal or absolute title therein, must be transferred on the books of the bank.

2. Whether the Supreme Court of the State of Indiana erred in deciding that under the construction by the United States Supreme Court of the Federal National Banking Act, in holding that an assignment of a certificate of national bank stock without a transfer on the books of the banking corporation, is not in point, for the reason that defendant in error might, as substance and not form is

regarded, show that the certificate was defendant in error's property.

3. Whether the Supreme Court of the State of Indiana erred in deciding that the defendant in error, Mary Opperman, in signing her name to the printed assignment of certificate of stock of the First National Bank, and thereafter delivering the said certificate of stock so assigned to her husband, Henry A. F. Opperman, and after the said Henry A. F. Opperman had received it, and had delivered the said certificate of stock to plaintiff in error, as collateral security, for a loan, that said defendant in error, Mary Opperman, in a suit of replevin for said stock, from plaintiff in error, could show orally that she, by said assignment, did not vest legal title to the said stock in said Henry A. F. Opperman; and show orally that she received no consideration from her husband for said certificate. And that Henry A. F. Opperman was permitted to show orally that he was not the legal owner of the said certificate of stock.

4. Whether the Supreme Court of the State of Indiana erred in deciding that the *nisi prius* court of Indiana did not err when it instructed the jury trying the case, that when the defendant in error signed her name to the certificate of stock, that she did not convey the title to such stock, and that before her cause of action can be defeated, the plaintiff in error must prove by a preponderance of evidence that the transferee Henry Opperman represented to the bank that he was the owner of the said stock, and that the said bank believed him, not knowing the statement to be false, and not knowing that the defendant in error was the owner of stock. That upon

these propositions the burden is on the plaintiff in error. And further that if defendant in error signed the certificate in blank and gave it to her husband for him to secure his debt, then she was surety.

5. That the said court erred in refusing to charge the jury that if the defendant in error signed and executed the assignment on the certificate of stock, which purported to sell the stock and voluntarily placed the stock in the possession of her husband, and the husband put up the stock with the plaintiff in error, and did not disclose that he was not the owner, and the plaintiff in error had no knowledge that he was not the owner, that the plaintiff in error was not required to make inquiry of the capacity of the defendant in error, nor can knowledge be implied to it.

6. It erred in refusing to instruct the jury that where the defendant in error placed the title of stock, and there is nothing to put the proposed purchaser on guard, such person so placing such title, is estopped from seeking to recover it.

7. The Supreme Court of the State of Indiana erred in deciding that the *nisi prius* court of the State of Indiana did not err when it refused to instruct the jury that the transfer of the stock on the books of the bank has no vitality or force; and erred when it refused to instruct the jury that the defendant in error had the right to assign or give the stock to her husband.

8. The plaintiff in error contends that the transfer of stock of a National Bank is governed by Sec. 12 of the National Bank Act, and as construed by the United States Supreme Court, and if a transfer

of stock is made, then any law of Indiana that is contrary thereto is repugnant to such United States Statute.

9. The Supreme Court of Indiana erred holding in that Sec. No. 7855 of R. S. 1914, which reads as follows:

> "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void" was not repugnant to Section No. 12 of the Banking Laws of the United States, which is Sec. 9676 of 1916 Compiled Statutes of U. S., which reads as follows:
>
> "The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

Manner of Raising Questions.

1. By the second paragraph of answer filed by plaintiff in error.

2. By the objections to testimony given on behalf of defendant in error.

3. By the objections to the instructions given to the jury.

4. By the objections to the refusal to give instructions tendered by plaintiff in error and refused by the court.

Specifications of Error.

Application was then made to the Chief Justice of the Supreme Court of the State of Indiana for a writ of error to review the judgment of said court. The writ was granted (see printed record at p. 132) and the case brought here.

Plaintiff in error making the following assignment of error:

I. The court erred in holding and deciding that the second paragraph of said plaintiff in error, the Citizens Bank of Michigan City, Indiana, answer did not state facts sufficient to constitute a defense to the action of the defendant in error.

II. The court erred in sustaining the demurrer of the defendant in error to the second paragraph of the answer of the plaintiff in error, the cause of demurrer being alleged that said second paragraph did not state facts sufficient to constitute a defense to the complaint.

III. That the court erred in the admission of evidence offered by the defendant in error, Mary Opperman, in the following instances, to wit:

(1) In the testimony given by Henry A. F. Opperman.

At the time that you got this certificate of stock from your wife, did you give her any money or anything else for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:

"I did not."

(2) In the testimony given by Henry A. F. Opperman:

"At the time that you got this certificate from your wife and gave it to Mr. Arnt at the Citizens Bank, did your wife receive anything from the bank for it?"

Which said question was answered by the said witness Henry A. F. Opperman in the following word:

"No."

(3) In the testimony given by Henry A. F. Opperman:

"Was this money that you borrowed of the Citizens Bank and for which the stock was put up as collateral used or any part of it used to pay any debt of your wife?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:

"It was not."

(4) In the testimony given by Henry A. F. Opperman:

"Was this money which you borrowed of the Citizens Bank and for which this stock was put up as collateral used or any part of it used to pay for any property of your wife's or that she bought or that was bought for her?"

Which said question was answered by the said witness Henry A. F. Opperman in the following words:

"It was not."

IV. That the court erred in the admission of evidence offered by the defendant in error, Mary Opperman, a witness in her own behalf, in the following instances, to wit:

(1) In the testimony given by Mary Opperman:

"What did he say he wanted with it?"

Which said question was answered by the said plaintiff, Mary Opperman, a witness in her own behalf, in the following words:

"As security."

(2) In the testimony given by Mary Opperman:

"What, if anything, did he say at that time as to where or with whom he was going to use it as security?"

Which said question was answered by the said defendant in error, Mary Opperman, a witness in her own behalf, in the following words:

"He said he wanted it as security to a loan of some money at the Citizens Bank."

(3) In the testimony given by Mary Opperman:

"Did he ever, at any time, give you any money or anything else for it?"

Which said question was then and there answered by the said defendant in error, Mary Opperman, a witness in her own behalf, in the following word:

"No."

V. The court erred in overruling the motion to strike out the answer of Mary Opperman to the following question, to wit:

(1) "What did he say he wanted with it?"

And to which question she gave this answer:

"As security."

VI. The court erred in using the following language in its charge to the jury, to wit:

Instruction 5.

The defendant contends that the plaintiff is estopped to claim ownership, and demand possession of the certificate of stock in question, because she signed the certificate of stock, in blank, and delivered said certificate of stock to her husband, Henry A. F. Opperman, and permitted him to take said certificate to the defendant, and represent to the defendant that he, the said Henry A. F. Opperman, was the owner thereof, which representation the defendant contends, that it, through its cashier, Charles E. Arnt, then believed to be true, and accepted said certificate as security, upon the statement of said Henry F. Opperman, not knowing the same to be false, and not knowing that Mary Opperman owned the certificate of stock in question. The burden of proving the facts constituting this estoppel rests upon the defendant, and before the plaintiff's cause of action can be defeated, because of such estoppel, the defendant must prove by a preponderance of all the evidence in the case that the facts constituting such estoppel existed; that the defendant did not know, or have reason to know that Mary Opperman was the true owner of said certificate of stock at the time it was accepted as security, by the defendant.

VII. The court erred in using the following language in its charge to the jury, to wit:

Instruction 6.

The burden is on defendant to establish the facts constituting an estoppel. The elements of such as estoppel are as follows, viz:

First. That there was a misrepresentation or concealment of material facts;

Second. That the misrepresentation was made with knowledge of the facts;

Third. That the party to whom it was made was ignorant of the truth of the matter;

Fourth: That it was made with the intention that the other party should act upon it; and,

Fifth. That the other party was induced to act upon it to his injury.

VIII. The court erred in refusing to charge the jury, as requested by said defendant, this plaintiff in error, in its request number 18, which is as follows, to wit:

Instruction 18.

I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to her husband or any other person. And if you find from the evidence that she signed and executed a written assignment of said certificate of stock which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband took the same to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt.

IX. The court erred in refusing to charge the jury, as requested by said plaintiff in error in its request number 21, which is as follows, to wit:

Instruction 21.

I instruct you as a matter of law that where a married woman places title to property, as in this instance a certificate of stock, in her husband, and the husband places such property in the hands of the defendant bank as collateral for money that he received from the said bank or for renewals of notes for money that he received, and that the bank had no notice of the wife's interest in the certificate of stock, that in that event your verdict should be for the defendant.

X. The court erred in refusing to charge the jury, as requested by said plaintiff in error in its request number 22, which is as follows, to wit:

Instruction 22.

A married woman cannot claim against the holder of collateral the rights of a surety when her husband had the title to the property that he placed in the hands of the defendant as collateral, and where there is nothing to put the holder of the collateral on notice of the wife's equitable interest in the property.

XI. The court erred in adjudging and deciding that, under the construction by the United States Supreme Court of the Federal National Banking Act, an assignment of the certificate of National Bank stock without transfer on the books of the banking corporation, is a complete transfer, vesting

title in the transferee, is not in point. In its holding that plaintiff might, as substance and not form is regarded, show that the certificate was her property.

XII. That the court erred in adjudging and deciding that the defendant in error, Mary Opperman, in signing her name to the printed assignment of certificate of the First National Bank, and thereafter delivering the said certificate of stock so assigned to her husband, Henry A. F. Opperman, and after the said Henry A. F. Opperman had delivered the said certificate of stock to appellant as collateral security for a loan, that the said defendant in error, Mary Opperman, in a suit of replevin for said stock from plaintiff in error, could show that she, by the said assignment, did not vest legal title to said Henry A. F. Opperman.

XIII. That the court erred in adjudging and deciding that the execution of the assignment in blank printed on the back of certificate of the First National Bank, and the delivery of the same so endorsed to her husband did not vest the legal title thereof in said husband, Henry A. F. Opperman, and the same is repugnant to and in conflict with, and in contravention of the laws of the United States, and particularly to Section 12 of the act of June 3, 1864, the same being commonly known and designated as the "National Bank Act" in that under the said National Bank Act the endorsement in blank and delivery of the said certificate vested the legal title of the said shares in the said Henry A. F. Opperman, the endorsee.

XIV. That the court erred in adjudging and deciding that the execution of the assignment in blank on the back of certificate by the defendant in error, Mary Opperman, and the delivery of the same so endorsed to Henry A. F. Opperman is repugnant to and in conflict, and in contravention with the laws of the United States and particularly to Section 12 of the act of June 3, 1864, the same being commonly known and designated as the "National Bank Act," in that it deprives this plaintiff in error of the right and title to such stock of such a banking corporation when the same is so endorsed in blank.

XV. That the court erred in adjudging and deciding in denying to this plaintiff in error the privilege and title under the laws of the United States, and particularly under Section 12 of the act of June 3, 1864, which is commonly known and designated as the "National Bank Act" of acquiring and taking as collateral the title of shares of the capital stock of such banking corporations when endorsed in blank.

XVI. That the court erred in adjudging, holding and deciding that when said defendant in error executed the said assignment of said stock, and therein authorized the endorsee to make the necessary transfer on the books of the bank, which assignment and authority was printed on the back of the said certificate of stock, did not vest the entire, both equitable and legal, title in the lawful possessor of such certificate.

XVII. That the court erred in rendering judgment for the defendant in error because it is in contravention of the National Banking Laws, in this,

the court held that the title to the certificate of stock did not pass without it being first transferred on the books of the bank.

Final Issues.

The above errors may be grouped for the purpose of simplifying the argument into five fundamental questions which therefore become the main issues of the case.

Thus: Errors I, II, XI, XII, XIII, XIV, XV, XVI and XVII becomes Issue I.

Error III rests upon Issue II.

Errors IV and V rests upon Issue III.

Errors VI and VII rests upon Issue IV.

Errors VIII, IX and X rests upon Issue V.

POINTS AND AUTHORITIES.

Issue I.

A married woman may contract in relation to her personal property under the statutes of Indiana the same as if unmarried, but a married woman cannot act as surety.

Is a federal question involved?

Is the Indiana statute repugnant to Section 12 of the National Bank?

Is the question of transferring stock in a National Bank governed by the federal law?

Point (a).

A married woman may contract in relation to her personal property under the statutes of Indiana the same as if unmarried.

A married woman may take, acquire and hold property, real or personal, by conveyance, gift, devise or descent, or by purchase with her separate means or money, and the same together with all the rents, issues, income and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were unmarried. And she may, in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange and convey her personal property, and she may also, in like manner, make any contracts with reference to the same, but she shall not enter into any executory contract to sell or convey or mortgage

her real estate, nor shall she convey or mortgage the same, unless her husband join in such contract, conveyance or mortgage: Provided, however, that she shall be bound by an estoppel in pais, like any other person.

Section 7853 of Revised Statutes of Indiana, 1914.

A married woman shall be bound by her covenants of title in conveyances of her separate property, as if sole. She shall be bound, in like manner, as principal on her official bond.

Section 7854 of Revised Statutes of Indiana 1914.

ARGUMENT.

Issue I.

A married woman may acquire personal property same as if married.

A married woman cannot act as surety.

The transfer of stock is governed by the federal law.

Indiana act is repugnant to Section 12 of the National Bank Act.

When an owner transfers, he convey the legal title.

Point (a).

A married woman under a statute of Indiana may own stock in a national bank, which reads as follows:

> "A married woman may take, acquire and have property, real or personal, * * * and the same * * * shall be * * * her own separate property, under her own control, * * * and she may in her own name, as if unmarried, at any time during coverture, sell * * * her personal property. * * *"

Section 7853 of R. S. of Indiana, 1914.

A married woman shall be bound by her covenants of title in conveyances of her separate property, as if sole.

Section 7854 of R. S. of Indiana, 1914.

Point (b).

> "A married woman shall not enter into any contract of suretyship, whether as indorser,

guarantor, or in any other manner and such contract, as to her, shall be void."

Section 7855 of R. S. of Indiana, 1914.

Under said section the defendant in error based her cause of action, and the Indiana court held it was not repugnant to Section 12 of the National Bank Act, which reads as follows:

"The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

1916 U. S. Comp. Statutes, Section 9676 (R. S., Section 5139).

Act of June 3, 1864, Chap. 106, Section 12.

13 Statute 102.

Point (c).

Transfer of stock in a national bank is governed by the federal law.

The charter of national bank is under a public statute of the United States, and by virtue of the Constitution of the United States this court is the final arbiter of all questions relating thereto and depending hereon, for (a) it is said in the case of *Texas, etc., R. Co.* v. *Hill*, 237 U. S. 208:

"As a corporation created by an act of congress, the plaintiff in error is inherently en-

titled to invoke our jurisdiction. Hence the motion to dismiss is without merit."

Again, (b) it is expressly held in the case of *Texas, etc., R. Co.* v. *Marcus,* 237 U. S. 215, in substance as follows: That the judgment of a Federal Circuit Court of Appeals in an action against a corporation, created by an act of congress, may be brought up for review in the Federal Supreme Court by a writ of error.

Again, (c) Section 237 of the Judicial Code provides that:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passes in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, in its discretion, award execution or remand the same to the court from which it was removed by the writ."

(2) The judicial construction of a charter of a federal corporation is a federal function and constitutes a suit "arising under the laws of the United States," for

(a) It is so held by the following cases:

Pacific R. R. Cases, 115 U. S. 1.
Union Pac. R. Co. v. *Harris,* 158 U. S. 326.

Point (d).

Conveyance of stock in a national bank is complete when certificate is signed and delivered.

As between the parties to a sale of stock of a bank, the sale is concluded when the certificate is delivered and the price is paid. It is not necessary in order to complete the sale, that there be a subsequent transfer of the certificate on the books of the bank.

Johnston v. *Laflin,* 103 U. S. 800.

As between the owner of stock in a bank and the purchaser, the property in the shares pass to the latter by the delivery of the certificate, with the accompanying power of attorney, without the formality of a transfer on the books of the bank.

Cecil National Bank v. *Watsontown Bank,* 105 U. S. 217, 224.

National Banks—Transfer of Stock.

Revised Statute United States, Section 5139 (1916 Comp. St., Section 9676) requiring to be transferred by endorsement on the corporate books, does not limit the right to pass title to stock certificate by assignment, being enacted for the protection of the banks, and the incorporation being entitled to waive its provision.

Gray v. *Fankhauser,* 58 Oregon 423;115 Pacific 146.

Congress may confer on national banks such powers and immunities as it sees fit, and the states can in no manner interfere therewith except as permitted by congress.

Farmers and Mechanics Nat. Bank v. *Dearing* (1875), 91 U. S. 29.

National banks are subject to state legislation, except where it conflicts with some act of Congress, or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States, or interferes with the purposes of their creation.

Waite v. *Dowley* (1876), 94 U. S. 527, 533.

So far as Code Iowa, Sections 1884, 1885, attempt to prohibit national banks from receiving deposits when insolvent, and prescribes a punishment for a violation of such prohibition by any officer or agent thereof, it is invalid as an attempt to control and regulate the business operations of national banks. *Easton* v. *State of Iowa* (1903), 188 U. S., 220, reversing judgment *State* v. *Easton* (1901), 85 N. W. 795; 113 Iowa 516; 86 Am. St. Rep. 389.

A national bank is a part of the general government's financial system, and state statutes relating to banks cannot control national banks.

Lucas County v. *Jamison* (C. C. 1909), 170 Fed. 338.

National banks are instrumentalities of the federal government, and any action of a state, which impairs their efficiency as such governmental agencies, or interferes with their legitimate business as banks, is unconstitutional and void. *Larabee* v. *Dolley* (C. C. 1909), 175 Fed. 365, order reversed *Dolley* v. *Abilene Nat. Bank of Abilene,* Kan. (1910), 179 Fed. 461; 102 C. C. A. 607; 32 L. R. A. (N. S.) 1065, and decree affirmed *Assaria State Bank of Assaria* v. *Dolley* (1910), 219 U. S. 121.

It is not within the power of a state legislature to alter, modify, add to, or diminish the powers,

duties, or liabilities created in or conferred upon banking associations established under a law of the United States (1869), 13 Op. Atty. Gen. 56.

Such associations cannot be merged or in any manner identified with similar corporations created by state legislation, without the authority of Congress. *Idem.*

The state is without authority to enact laws, either in the form of constitution or statute, that in any manner conflicts with the National Banking Act, or interfere with or undertake to regulate or control the business that national banks are authorized by such act to carry on.

First Nat. Bank of Elizabethtown v. *Commonwealth* (1911), 137 S. W. 518; 143 Ky. 816; 34 L. R. A. (N. S.) 54.

National banks, as federal agencies, are exempted from state leigslation only so far as it may interfere with or impair their efficiency in performing the functions by which they are designed to serve the national government.

Thomas v. *Farmers Bank* (1877), 46 Md. 43.

The power to create a corporation as an appropriate instrument for the execution of a constitutional power vested in the federal government, only carries with it authority to confer upon that corporation such privileges or immunities from state laws as are necessary to enable it to effect the legitimate national objects for which it is created.

First Nat. Bank v. *Lamb* (1872), 50 N. Y. 95; 10 Rep. 438.

National banks are responsible alone to the national government, and are as independent of state

legislation or interference as the army, navy, mint, or judicial tribunals of the United States.

Pittsburgh v. *First Nat. Bank* (1867), 55 Pa. St. (5 P. F. Smith) 45.

National banks are exempt from all state interference tending to diminish or interrupt their efficiency as agents of the Federal government.

McCulloch v. *State*, 4 Wheat. 316.
Osborn v. *Bank of U. S.*
Van Allen v. *Assessors*, 3 Wall. 573.
People v. *Com.*, 4 Wall. 224.
Nat. Bank v. *Com.*, 9 Wall. 353.
Thompson v. *Pacific Ry.*, 9 Wall. 579.

National banks are subject to the state legislation, except where it conflicts with some act of Congress, or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States or interferes with the purpose of their incorporation.

Waite v. *Dowley*, 94 U. S. 527, 533.

In an action against a married woman who was a stockholder in a national bank for an assessment levied to pay creditors, this court said:

> "To hold that a state law, were there such a law, could except certain shares from the liability, would enable states to defeat the policy of the federal government in establishing the national banking system. That the Congress has power to establish and legislate for such banks has not since 1819 been an open question. If a purchase of stocks in a national bank by a married woman gives her the ownership of such stock, judgment must be given against the feme defendant. If she owned the stock she was liable as a stockholder. While the federal government exclusively controls the question of the

liabilities of stockholders in national banks, a state has power to say, not in conflict with organic law, a particular class shall not be permitted to own particular classes of property.

A married woman is capable of holding shares in a national bank under the laws of Indiana, and such shareholder was subject to the personal liability imposed by the National Banking Laws.

All shareholders of stock in national banks become such, subject to the condition, declared by statute, that liability to the extent of their shares, is imposed upon them for the contracts, debts, and engagements of the bank. The statute, in effect, says to all who become owners of national bank stock, no matter in what way they become shareholders, that they cannot enjoy the benefits accruing to shareholders, and escape liability for the contracts, debts and engagements of the bank. In other words, the government that created the bank has prescribed the terms upon which ownership of its shares could be acquired, and individual liability incurred by shareholders. No exception is made in favor of married women holding property; and as the local law does not forbid married women from becoming the owners of bank stock, we do not go beyond what is necessary for the decision of the present case under the National Banking Law. The court below properly rendered a personal judgment against Mrs. Christopher as a shareholder."

Christopher v. *Norvell*, 201 U. S. 216.

It is said in *Gray* v. *Fankhauser* in 58 Oregon 423, same case in 115 Pacific Reporter, page 146. It says that:

"We cannot agree with counsel that the National Banking Act limits the right of passing title to stock certificates by assignment. The provisions of the United States Revised Statutes, Section 5139 (U. S. Comp. St. 1901, p. 5139), and similar state statutes, providing

that stock shall be transferred by indorsement on the books of the corporation, have generally been held to be for the protection and convenience of the bank, and that no effect should be given to them except for the protection of the corporation which can waive them at pleasure. *McNeil* v. *Tenth National Bank, supra* (46 N. Y. 325), was a case arising upon a pledge of certificates of national bank stock under circumstances exactly similar to the case at bar, and it was there held that an assignment in blank, almost word for word in the same language as used in the assignment in the present case, transferred the entire title to the shares, both legal and equitable. That case is so thoroughly discussed and its every feature so similar to the one at bar that we feel constrained to adopt it as aptly expressing our opinion on the contentions here involved."

In *Hobart* v. *Johnson,* 8 Fed. Rep. 493, 495, 19 Blatchf. (U. S.) 359, 362, Blatchford, C. J., holds that the doctrine of estoppel precludes a married woman from enjoying the position of a shareholder and then repudiating the statutory liability attached to it.

A married woman is liable to assessment, although by the law of her domicil, where the action is brought, she is prohibited from making any contract except for necessaries, the reason being that the acquisition of the stock is not a contract within the prohibition of the statute.

Robinson v. *Turrentine,* 59 Fed. Rep. 554.

See also:

Anderson v. *Line,* 14 Fed. Rep. 405.

Issue II.

May a grantor or assignor of stock in a national banking association after the conveyance the same vary such conveyance so as to prove that he had no title to such stock when he made the conveyance thereof.

Point (a).

The Supreme Court of Indiana erred in deciding that the trial court was not in error in its ruling that Henry A. F. Opperman, after the assignment to him by his wife of the said certificate of stock, and after he delivered the certificate of stock to the plaintiff in error as collateral, in a suit of replevin for said stock could show orally that the title thereof was not in him, the said Henry A. F. Opperman, but in his wife, Mary Opperman.

This involves the third specification of error of this brief.

At the trial of the said cause the said Henry A. F. Opperman, a witness called for and on behalf of the said defendant in error, was asked the following questions and gave the following answers, over the objections of this petitioner, to wit:

Q. Who, if anybody, gave her any directions as to writing her name on it? (P. R., p. 50 (99).)

A. I did; or rather I was directed to tell her.

Q. Now, Mr. Opperman, at the time you gave this certificate of stock, which I believe is mentioned in this collateral agreement as certificate No. 385, did you receive any money from the Citizens Bank?

A. No.

Q. Did your wife receive any money at that time?

A. No, sir. (P. R., p. 53 (104).)

Q. Now, did you get any other money than those items you have mentioned, from the bank?

A. That is all. (P. R., p. 55 (107).)

Q. At the time that you got this certificate of stock from your wife did you give her any money or anything else for it?

A. I didn't. (P. R., p. 55.)

Q. At the time that you got this certificate from your wife and gave it to Mr. Arnt at the Citizens Bank did your wife receive anything from the bank for it?

A. No. (P. R., p. 55.)

Q. Was this money that you borrowed of the Citizens Bank and for which the stock was put up as collateral used, or any part of it used to pay any debt of your wife's?

A. It was not. (P. R., p. 56.)

Q. Was this money which you borrowed of the Citizens Bank and for which this stock was put up as collateral, or any part of it, used to pay for any property of your wife's or that she bought or that was bought for her?

A. It was not. (P. R., p. 56.)

Q. Do you know where your wife got that stock?

A. Yes. (P. R., p. 56.)

The point against this testimony is that it tends to defeat the title of your plaintiff in error to the said stock put up as collateral by the said witness. The evidence tends to prove that the said Henry Opper-

man had no title to the said stock which he had put up as collateral to the said loan, while your plaintiff in error contends that it was incompetent in this case that the said Henry Opperman could testify to any state of facts that had any tendency to defeat the title of your plaintiff in error to the said stock, because of the fact that your plaintiff in error had derived its title thereto directly from the said witness.

The declarations of a holder of a chattel or promissory note, while he held it, are not competent evidence in a suit upon it or in relation to it, by a subsequent owner.

Dodge v. *Freedman's Company,* 93 United States 379.

Parol evidence is inadmissible to add to, vary, change the terms of a deed not attached on the ground of fraud or mistake.

Trullinger v. *Weeb,* 3 Indiana 198.

Doe et al. v. *Swails,* 3 Indiana 329.

Burns et al. v. *Jenkins et al.,* 8 Indiana 417.

New Albany & Salem R. R. Co. v. *Fields,* 10 Indiana 187.

Barnes v. *Bartlett,* 47 Indiana 98.

Parol evidence is not admissible to vary the legal import of the language used in a written instrument, than it is to vary or add to the language itself; to do one, is, to do the other; the result in either case being the same.

Fuller Administrator v. *Hapgood,* 39 Vermont 617.

The transfer of stock by delivery of the certificate, indorsed in blank, or with power of attorney, passes title without transfer on the company's books,

though the by-laws provide to the contrary, and the transferee may fill in the blanks, and it may be filled in with the name of a remote transferee; the name inserted being immaterial to the transferror.

McCarthy v. *Crawford,* 238 Ill. 380.

The contention is not made that such evidence could not have been submitted by defendant in error through a proper witness, a different person, but the claim is that Henry Opperman was not in a position to give testimony against the title he has vested in your plaintiff in error when he put up the said stock as collateral. His mouth was closed and should not have been heard to utter any word of his in disparagement of title of plaintiff in error.

Where the owner puts his name on the back of a certificate of stock and allows it to go into the market with that transferrable quality about it, it does not lie in his mouth who offered it into the world in that shape, to deny his own words and actions.

McNeil v. *Tenth National Bank,* 46 New York 325.

The husband, Henry Opperman, was a witness for defendant in error and as such a witness, he testified to an alleged conversation with Mr. Arnt in which he makes the statement that he, on one occasion, before the delivery of the stock certificate as such collateral, said the stock was his wife's. (P. R., p. 48 (96).)

The plaintiff in error claims that after the husbank, Henry Opperman, had so put up the said certificate of stock with plaintiff in error as collateral security, then and after such fact it was not proper that the said Henry Opperman should be allowed to

testify to any state of facts that had any tendency to defeat the title to the said stock so held by plaintiff in error through the said Henry Opperman; that it was not competent that anything should come from his mouth that was in any way in disparagement of his title to the said certificate of stock so put up by him as collateral security to his loan.

The questions were quite inadmissible as against the purchaser and assignee, since it was not shown to have had any notice of the conversation, and, therefore, in taking the certificate of stock, was only bound by the obligations imparted by the words in their ordinary commercial sense.

The Barnstable, 181 U. S. 464.

The statements of a holder of negotiable paper, made either before acquiring or after parting with title, are inadmissible.

Fisher v. *True,* 38 Me. 534.

It is proper to prove by parol the consideration of a mortgage, but it is not competent to contradict by parol, the conveying part of the instrument. There is a clear distinction between proving the consideration of a mortgage and proving by parol an agreement destroying the effect of the covenants contained in it.

Murdock v. *Cox,* 118 Ind. 266.

Point (b).

The state statute, which reads as follows:

> "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void."

(Section 7855 of Revised Statutes of Indiana, 1914) is repugnant to section 12 of "The National Bank Act," which reads as follows:

> "The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."
>
> 1916 U. S. Comp. Statutes, Section 9676. (R. S. Section 5139).
>
> Act of June 3, 1864, Chap. 106, Section 12; 13 Statute 102.

In this, that it is held under the said Indiana Act that the defendant in error did not transfer, assign, and convey her said stock, though in all things complied with the terms of said "The National Banking Act," such facts did not constitute a transfer of said stock, but that such transfer was void under said Indiana Act, and that said "The National Banking Act" had no application under such facts.

That said statute of the State of Indiana as construed by the Supreme Court of the State of Indiana is in violation of, and in conflict, and repugnant with the section No. 12 of said act of Congress of United States known as the "National Bank Law," in that the purpose and intent of said act of Indiana are to enable the grantors of National bank stock to

exempt themselves from the liability and rights created by said act of Congress.

Section 237 of Judicial Code.

Point (c).

Is a federal question involved?

Complaint in a court of law for the replevin of a certificate of stock in a national banking corporation, organized under the laws of the United States, to this complaint an answer setting forth that certificate was signed in blank and under United States laws conveyed the legal title by delivery.

Demurrer sustained to this answer for want of facts.

That the said answer especially set up and alleged that the said First National Bank of Michigan City was at the time said certificate was issued and ever since has continued to be a corporation organized and doing business under and by virtue of the Banking Laws of the United States of America; that the defendant in error assigned said certificate, in blank and without restrictions, and that this plaintiff in error relying upon such facts and the certificate being in the possession of Henry A. F. Opperman, it granted him extension of certain notes then owing by him and for that reason the said defendant in error should be estopped to set up any claim to said certificate.

Complaint in P. R., p. 2 (3).
Answer in P. R., p. 5 (11).
Demurred in P. R., p. 8 (17).

The Federal question was again raised by an instruction tendered by plaintiff in error, wherein it

requested the court that the provision in the assignment of the certificate, to wit:

"Transferable only on the books of the bank in person or by attorney on the surrender of this certificate," has no vitality or force whatever. (P. R., p. 16 (31).)

And the Federal question was again raised by the tender of an instruction, which was refused, which reads as follows:

No. 18. I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to her husband or any other person. And if you find from the evidence that she signed and executed a written assignment of said certificate of stock which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband took the same to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt. (P. R., p. 19 (37).)

Where a party in a state court insists, by way of objections to or requests for instructions upon a construction of a statute of the United States, which will lead, or, on possible findings of fact from the

evidence, may lead to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the questions thus raised may be reviewed in the United States Supreme Court.

Code of 1916, Sec. 237.

St. Louis & Iron Mt. Ry. v. *Taylor,* 210 U. S. 293.

Also:

Acme Harvester Co. v. *Beckman Lumber Co.,* 222 U. S. 305.

Mutual Life Co. v. *McGrew,* 188 U. S. 291.

The Federal right is not required to be pleaded in any special or particular form. It is enough that it be relied upon and in proper manner called to the attention of the court. The courts take judicial notice of the statutes. It is the right, privilege, or immunity of Federal origin which must be brought to the attention of the State Court.

St. Louis Iron Mt. v. *So. Ry.,* 243 U. S. 592.

And again the question is recognized as having been raised as the Indiana Supreme Court in its decision, the rule that, under the construction by the Federal Courts of the Federal National Bank Act, an assignment of a certificate of National Bank stock without transfer on the books of the banking corporation, is a complete transfer, vesting title in the transferee, is not in point. Even though the transfer had been made on the bank's books, the defendant in error might, as substance, and not form is regarded, show that the certificate was her property, and the completeness of the transfer, whether by assignment only, or by entry on the books of the cor-

poration would be pertinent only to the issue of estoppel. (P. R., p. 124 (230).)

Where a national bank is sought to be charged as stockholder in another corporation, the averment in its answer that the stock was issued to it "without authority of law" must be construed as referring to the law of the United States governing national banks, and therefore raises a Federal question.

California National Bank v. *Kennedy*, 167 U. S. 362.

Where is drawn in question the validity of a statute of or the construction of a statute of the United States and the decision is against the title set up or claim, such judgment may be re-examined by writ of error in the United States Supreme Court.

Martin v. *Hunter*, 1 Wheat 306.

When the respondent signed the certificate of stock in the National Banking Corporation without any restrictions, such assignment conveys the legal and absolute title thereto without such transfer having been made on the books of the bank.

It is the contention of the plaintiff in error that the Supreme Court of the State of Indiana erred, when it found in its decision that the legal title to the certificate of stock had not passed when it was signed in blank.

Answer is good which alleges that a certificate in a national banking association is signed in blank and delivered to a third party.

The provisions of the National Banking Act is, that the stock shall be transferable on the books of the bank in such manner as may be prescribed by its

by-laws. A by-law which provides that the stock shall not be transferable only on the books of the bank does not affect the construction of the act, a national bank being a federal corporation remains under the federal statute, it depends upon the construction given by the United States courts; this must be determined by the statute itself, and the construction given to it by the Supreme Court of the United States, so far as it has been construed by that court.

Sibley as Administratix v. *National Bank*, 133 Mass. 515.

Knight v. *Old National Bank*, Federal Cases No. 7,885.

Black v. *Zacharie*, 3 Howard 483.

Bank v. *Lanier*, 11 Wall. 369.

National Bank v. *Watsontown Bank*, 105 U. S. 217.

Johnston v. *Laflin*, 103 U. S. 800.

Bank v. *Elliot*, 7 Fed. Rep. 369.

Dickinson v. *Bank*, 129 Mass. 279.

The answer alleges that the stock in controversy was that of a bank organized under the United States National Banking Laws. (P. R., p. 5 (11).)

As between the owner of shares of stock in a national bank and the purchaser, the property in shares passed to the latter by duly signing and delivery of the certificate, with the accompanying power of attorney, without the formality of a transfer upon the books of the bank.

Bath Sav. Inst. v. *Sagadahoc Bank*, 89 Me. 500.

Johnston v. *Laflin*, 103 U. S. 800.

Cecil Natl. Bank v. *Watsontown Bank*, 105 U. S. 217.

Doty v. *Larimore Natl. Bank*, 3 N. Dak. 9; S. C.

Sibley v. *Natl. Bank*, 133 Mass. 515.

Bank v. *Williston*, 138 Mass. 244.

It follows that when Henry Opperman received from Mary Opperman the certificate of stock in question signed by her in blank it vested in him the legal title of such stock. The assignee of shares of stock in a national bank with power to transfer the same takes an absolute title to the shares, subject to any lien or liens of the bank created by articles or by-laws in favor of the bank and on presentment may require a new one against subsequent or attaching creditor.

Bank v. *Lanier*, 11 Wall. 369.

Moores v. *Bank*, 111 U. S. 163; S. C., 4 Sup. Ct. Rep. 345.

Dickinson v. *Bank*, 129 Mass. 279.

Sibley v. *Bank*, 133 Mass. 515.

Bath Sav. Ins. v. *Sagadahoc Bank*, 89 Me. 500; S. C. 36 Atl. 996.

Bank v. *Elliot*, 7 Fed. Rep. 369.

Johnson v. *Laflin*, 103 U. S. 800.

Unquestionably where the stock of a national banking corporation is by the terms of its by-laws or charter transferable on its books, still the purchaser who receives a certificate with a power of attorney, acquires the entire title, legal and equitable as between himself and seller, with all the rights which the latter possessed, but as between himself and the bank corporation he acquires only the equitable title which the corporation is bound to recognize whenever he presents himself.

Knight v. *Old Natl. Bank*, Federal Cases No. 7,885.

The Supreme Court erred when it decided that the Federal authorities do not apply. One of the phases of this cause turns on this holding.

If it can be held that the Federal decisions do not apply in this case and by reason of such holding this plaintiff in error has lost its title to the said stock, or if it is held that the Federal decisions do apply, and by reason of such holding this plaintiff in error would hold its title to said stock, then it becomes and is clear that the construction made by the Federal decisions are involved and are controlling in the decision of this cause, and should have been followed in the determination of the cause.

In this case, at printed record page 124 (230), the Supreme Court of the State of Indiana held that the construction by the Federal Courts of the Federal Bank Act is not in point. That the defendant in error might, inasmuch as substance, and not form is regarded, show that the certificate was her property, and the completeness of the transfer, whether by assignment only or by an entry on the books of the corporation, would be pertinent only to the issue of estoppel.

Your plaintiff in error presenting the contention that, under the Federal authorities, and the application of the same, to the facts in this case, there can be no foundation to the claim that, in this cause the fact is, the wife simply pledged her property to be used or returned, or released, contingent upon the default or payment of her husband of his debts, the arrangement is not an absolute or complete parting with her title, though the face of the papers signed by her may so indicate; but that under such authorities and the facts in the case, it is clear that the wife

in signing the said certificate, and presenting the same to her husband, without any restriction being stated in the paper, vested in her husband the legal title to the same, and that she passed her entire title thereby to her husband, and when the husband put up the stock as collateral, he vested his title in your plaintiff in error, subject only to his or her right to redeem the same under his collateral contract.

It is the contention of this plaintiff in error that the defendant in error executed an assignment of her certificate of stock in blank and after so doing delivered that certificate to Henry A. F. Opperman; that she vested in said Henry A. F. Opperman the legal title of said certificate of stock and such vesting is governed by the statutes of the United States as construed by the decisions of this court, regardless that substance and not form is regarded by the Supreme Court of the State of Indiana.

Questions of assignment of stock in a national bank "must be determined by the statute itself, and the construction given to it by the Supreme Court of the United States."

Sibley v. *Quinsigamond National Bank,* 133 Mass. 515.

Point (d).

Is the question of transferring stock in a national bank governed by the federal law?

> "The right to be a stockholder is given to her by the law of the state where she resides, and her rights and liabilities as such as are provided by the acts of Congress."
>
> *Christopher* v. *Norvell,* 201 U. S. 216.

The bank, although its shares of stock were private property, was an instrumentality of the general government in the conduct of its affairs.

Farmers' & M. Nat. Bank v. *Dearing,* 91 U. S. 29, 33.

In *Davis* v. *Elmira Sav. Bank,* 161 U. S. 275, 283, the court said that:

> "National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States."

This principle was reaffirmed in *Easton* v. *Iowa,* 188 U. S. 220, 237. See also *Pacific Nat. Bank* v. *Mixter,* 124 U. S. 721.

Christopher v. *Norvell,* 201 U. S. 216.

> "By the banking laws of the United States all the shares in the stock of national banks are liable to an assessment like the one levied on the stock of plaintiff's bank. To hold that a state law, were there such a law, could except certain shares from the liability, would enable states to defeat the policy of the Federal Government in establishing the national banking system. That the Congress has power to establish and legislate for such banks has not, since 1819, been an open question. (*McCulloch* v. *Maryland,* 4 Wheat. 316, 4 L. ed. 579.) If a purchase of stocks in a national bank by a married woman without the written consent of her husband gives her the ownership of such stock, judgment must be given against the feme defendant. If she owned the stock at the failure of the bank, she is liable to the assessment; if she did not, she is not liable. While the Federal Government exclusively controls the question of the liabilities of stockholders in national banks, it is not doubted but that a state has power to say that, for reasons seeming good to

its legislature, and not in conflict with organic law, a particular class of persons shall not be permitted to own particular classes of property."

Christopher v. *Norvell,* 201 U. S. 216.

The provision of the New York banking law that debts due saving banks by an insolvent bank shall be preferred is repugnant to Rev. St. §§ 5236, 5242, requiring the assets of an insolvent national bank to be distributed ratably among the creditors, and is therefore inapplicable in the case of a national bank.

Davis v. *Elmira Sav. Bank,* 161 U. S. 275.

National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

Davis v. *Elmira Sav. Bank,* 161 U. S. 275.

"The states can exercise no control over them (national banks), nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.' * * * 'The states have no power, by taxation or otherwise,

to * * * burden, or in any manner control, the operation of constitutional laws enacted by Congress to carry into execution the powers vested in the general government.'"

Easton v. *State of Iowa*, 188 U. S. 220.

Farmers & M. Nat. Bank v. *Dearing*, 91 U. S. 29.

So far as Iowa Code, §§ 1884, 1885, attempts to prohibit national banks from receiving deposits when insolvent, and prescribes a punishment for a violation of such prohibition by any officer or agent thereof, it is invalid as an attempt to control and regulate the business operations of national banks.

Easton v. *State of Iowa*, 188 U. S. 220.

Amended answer alleges the execution of the assignment of the certificate in blank and authorizes, to make necessary transfer on books of the bank, thus conveying the legal title. (P. R., p. 7 (14).)

It follows that when Henry Opperman received from Mary Opperman the certificate of stock in question signed by her in blank, it vested in him the legal title of such stock, therefore it is governed by the act of Congress, and need not plead a custom.

Bank v. *Lanier*, 11 Wall 369.

Moores v. *Bank*, 111 U. S. 163.

S. C. 4 Sup. Ct. Rep. 345.

Dickinson v. *Bank*, 129 Mass. 279.

Sibley v. *Bank*, 133 Mass. 515.

Bath Sav. Ins. v. *Sagadahoc Bank*, 89 Me. 500, S. C., 36 Atl. 996.

Bank v. *Elliot*, 7 Fed. Rep. 369.

Johnson v. *Laflin*, 103 U. S. 800.

It was claimed by defendant in error that the assignment of the certificate was in violation of Sec. No. 7855 of R. S. of Indiana of 1914, which reads as follows:

> "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void."

The provisions of the National Banking Act is, that the stock shall be transferrable on the books of the bank in such manner as may be prescribed by its by-laws. A by-law which provides that the stock shall not be transferrable only on the books of the bank does not affect the construction of the act, a national bank being a federal corporation remains under the federal statute, it depends upon the construction given by the United States courts; this must be determined by the statute itself, and the construction given to it by the Supreme Court of the United States, so far as it has been construed by that court.

Sibley, as Administratrix, v. *National Bank,* 133 Mass. 515.

Knight v. *Old National Bank,* Federal Cases No. 7,885.

Black v. *Zacharie,* 3 Howard 483.

Bank v. *Lanier,* 11 Wall 369.

National Bank v. *Watsontown Bank,* 105 U. S. 217.

Johnston v. *Laflin,* 103 U. S. 800.

Bank v. *Elliot,* 7 Fed. Rep. 369.

Dickinson v. *Bank,* 129 Mass. 279.

Issue III.

Point (a).

The Indiana Court permitted defendant in error to testify to the conversation had between herself and her husband when she executed assignment of the certificate stock; when she delivered it to her husband; and for her to testify that she received no consideration for assignment and delivery of stock.

It is not competent to prove verbal arrangements changing the terms of a writing.

Van Nostrand v. *Reed*, 1 Wend. 424.
Erwin v. *Sanders*, 1 Cow. 249.
Wolfe v. *Myers*, 3 Sandf. 7.
Worrell v. *Mumm*, 5 N. Y. 229.
Scoville v. *Griffith*, 12 N. Y. 509.
Dargin v. *Ireland*, 14 N. Y. 322.

The evidence is that respondent, Mary Opperman, was the owner of certificate No. 385, representing fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana; that she assigned to her husband, Henry A. F. Opperman, the said certificate of stock by endorsing the same in blank, that is signing her name to the printed assignment on the back thereof, and thereafter delivering the so endorsed certificate to her husband. There being no restrictions contained in such certificate of assignment; said assignment containing also a power of attorney in blank authorizing the transfer of the same on the books of said bank. (P. R., p. 58 (112).)

After such delivery to him so endorsed, the husband, Henry Opperman, put the same up as collat-

eral security with your petitioner, Citizens Bank, of Michigan City, Indiana, as security for a loan by him at said Citizens Bank.

Mary Opperman as a witness at the trial, testified that her husband, at the time of the signing of such certificate, told her that he wished to put up the same as security and that he had discussed the matter with and told Mr. Arnt that he could get the said stock for such purpose, and that she so assigned the said stock for such purpose. (P. R., p. 65 (123).)

Of course, the real purpose of this testimony was to bring actual notice to the Citizens Bank of the fact that Mary Opperman was the owner of the said stock.

Your petitioner presents the claim that, though such testimony was admissible as a part of the *res gestae*, still it was not evidence of any probative value as to whether or not any such conversation was actually had between her husband and Mr. Arnt, so that as far as it may relate to your petitioner, this evidence was purely hearsay and is of no weight as to whether or not any such conversation was ever had; that as far as this testimony of Mary Opperman is concerned, the Citizens Bank had no notice of any such fact.

The statements made as a part of the *res gestae* are not admissible testimonially to prove the facts stated.

Bank v. *Kennedy*, 17 Wall. 19 (U. S.).
State v. *Horton*, 33 La. Ann. 289.
Appleton v. *State*, 61 Ark. 590.
Moses v. *Katzenberger*, 84 Ala. 95.

As evidence of facts, asserted as part of the *res gestae*, they are objectionable as hearsay and are to be excluded.

Pond v. *Okey*, 70 Iowa 244.

The words spoken were a part of the *res gestae*, it proved that the words were spoken. The words did not prove that the horse received the shock, only that it was said so.

Castner v. *Sliker*, 33 N. J. L. 507.

Issue IV.

The Indiana Court held that the burden of proving estoppel was on plaintiff in error, and gave an instruction to the facts that would constitute an estoppel *in pais*, instead of instructing as to what facts constitute estoppel by contract.

Point (a).

ESTOPPEL BY CONTRACT.

Estoppel to deny the truth of facts agreed upon and settled by force of entering into the contract.

It is analogous to certain phases of estoppel by deed, and not of estoppel *in pais*, since it is based on a written instrument.

16 Cyc. page 719, paragraph "A."

Grand Rapids Fourth Nat. Bank v. *Onley*, 63 Mich. 58.

Delaney v. *Dutcher*, 23 Minn. 373.

St. John v. *Roberts*, 31 N. Y. 441.

Paragraph Second was based on the theory of estoppel by contract; not of Estoppel *in Pais*. The

demurrer thereto should have been overruled, and Defendant in Error should have been required to file a Reply setting up her converture and have burden of proof thereof, and not upon the plaintiff in error as instructed in said Instruction No. 5.

Bigelow on Estoppel, 2d Ed., p. 529, 543, Paragraph 1.

Issue V.

A married woman under the laws of Indiana can make a contract in relation to her separate property, as fully as if she were unmarried, except as to her lands, and she cannot enter into any contract of suretyship.

Point (a).

All the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided.

Section 7851 of Revised Statute 1914.

A married woman may take, acquire and hold property, real or personal, by conveyance, gift, devise or descent, or by purchase with her separate means or money; and the same, together with all the rents, issues, income and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were unmarried. And she may, in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange and convey her personal property; and she may also, in like manner, make any contracts with reference to the same; but she shall not enter into any executory contract to sell or convey or mort-

gage her real estate, nor shall she convey or mortgage the same, unless her husband join in such contract, conveyance or mortgage: Provided, however, that she shall be bound by an estoppel *in pais,* like any other person.

Section 7853 of Revised Statute 1914.

Point (b).

"A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner, and such contract, as to her, shall be void."

Section 7855 of Revised Statute 1914.

Public Interest.

The question involved in this review is of public interest in so far as the commercial world is concerned, as is well said by Circuit Judge Thayer in the following words:

"It is a well-known fact that stock certificates frequently circulate in places far remote from the home of the corporation by which they were issued, that in all commercial centers they are commonly transferred from hand to hand like negotiable paper, and that they are hypothecated for temporary loans by a simple indorsement and delivery thereof, the latter being perhaps the most common use to which such securities are put. In the great majority of cases, when stock is merely pledged for a loan, no record of the transfer is made on the books of the corporation, and in the judgment of laymen the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commermercial transactions, and that the public inter-

est is best subserved by removing all restrictions against their circulations, and by placing them as nearly as possible on the plane of commercial paper."

Masury v. *Arkansas Nat. Bank,* 93 Fed. 603.

CONCLUSION.

The blank assignment made by the defendant in error upon the delivery of the certificates to her husband, Henry Opperman, a debtor of plaintiff in error, gave to her said husband the apparent authority to deal absolutely with the stock; and a pledgee in good faith, without notice of any infirmity in her husband's title, is entitled to have the proceeds of the shares applied on its debt. It is well established that when the true owner places in the hands of another all the indicia of the ownership of property, so that he appears to have the full power of disposing of it, innocent persons dealing with such apparent owner will be protected. The rights in such a case do not depend on the actual authority of the person with whom they deal, but upon the apparent authority with which the confidence or negligence of the true owner has invested him.

McNeil v. *Tenth National Bank,* 46 N. Y. 325, 7 Am. Rep. 341.

Assignments in blank of the character of what now is under consideration are perhaps the most common method of transferring the title to certificates

of stock, and have been generally recognized by the courts of our great commercial states.

N. Y. & N. H. R. R. Co. v. *Schuyler*, 34 N. Y. 30.

Kortwright v. *Buffalo Commercial Bank*, 20 Wend. 91.

In the latter case the court says:

> "The execution in blank must have been for the express purpose of enabling the holder, whoever he might be, to fill it up. If intended to have been filled up in the name of the first transferee, there would have been no necessity for its execution in blank. The defendant in error might have completed the instrument. The usage, however, is well established, and was fully understood by defendant in error, as she made the transfer in conformity to it; and she or those setting up a claim under her should not now be permitted to deny its validity. The filling up is but the execution of an authority clearly conveyed to the holder, is lawful in itself, and convenient to all parties, as it avoids the necessity of needlessly multiplying transfers upon the books."

The National Banking Act does not limit the right of passing title to stock certificates by assignment. The provisions of the United States Revised Statutes, Section 5139 (U. S. Comp. St. 1916, Section 9676), and similar state statutes, providing that stock shall be transferred by indorsement on the books of the corporation, have generally been held to be for the protection and convenience of the bank, and that no effect should be given to them except for the protection of the corporation which can waive them at pleasure. *McNeil* v. *Tenth National Bank, supra*, was a case arising upon a pledge of certificates of national bank stock under circumstances

similar to the case at bar, and it was there held that an assignment in blank, almost word for word in the same language as used in the assignment in the present case, transferred the entire title to the shares, both legal and equitable."

It follows from these considerations that the defendant in error is not entitled to the possession of the stock in question until she redeems by the paying of her husband's obligations to the plaintiff in error.

Gray v. *Fankhauser*, 58 Oregon 423; S. C. 115 Pacific 146.

See also:

Earle v. *Carson*, 188 U. S. 42,

and

First National Bank of South Bend v. *Lanier & Handy*, 11 Wallace 369-378; 78 U. S. 369.

The controlling question in the case is, did the coverture of the defendant in erorr, at the time her name was placed on the books of the bank as a shareholder, as well as when she received the certificate of stock, prevent her to assign and transfer the stock to her husband, though it be used by her husband as collateral for loans made by him.

This was an action at law by a person who owned the shares of the stock of a national bank. The contention in the case was that the coverture of the defendant, at the time she executed the assignment and delivered it to her husband, was void, for the reason that her husband intended to use the said certificates executed in the manner aforesaid, as collateral security, for his own debt. Under the laws of Indiana the said defendant in error was not in-

capacitated from becoming the owner of stock in a national bank, and in that event she became, by force of the National Banking Act, equal with other shareholders. The National Banking Act imposes the same responsibility, and the same rights upon all shareholders of national banks, it makes no exception in favor of married women. There is nothing in the statutes that the coverture of defendant in error, preventing her in owning the certificates of stock, that when she assigned her stock she was within the meaning of the federal statute of shareholders in the bank, and the transfer of her stock was governed by the Federal National Banking Act.

We submit, therefore, that the judgment of the Supreme Court of the State of Indiana should be reversed, or modified, for all of which we pray.

Jeremiah B. Collins,

Worth W. Popple,

Attorneys for Plaintiff in Error.

Received a copy of the brief therein this ..... day of October, 1918.

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Attorneys for Defendant in Error.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

No. 610 (26,077).

CITIZENS BANK OF MICHIGAN CITY, INDIANA,
Plaintiff in Error,

vs.

MARY OPPERMAN,
Defendant in Error.

In Error to the Supreme Court of the State of Indiana.

BRIEF FOR DEFENDANT IN ERROR.

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MARY OPPERMAN,
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In Error to the Supreme Court of the State of Indiana.

BRIEF FOR DEFENDANT IN ERROR.

I.

The Case.

On September 19th, 1914, defendant in error was the owner of certificate of stock No. 385 for fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana. Her husband was indebted to plaintiff in error, and plaintiff in error, through its cashier, demanded additional security. The husband stated to the

cashier that he might get said certificate of defendant in error and deposit it as security. The cashier told him to get it. The cashier was acquainted with defendant in error and her husband, and had known them to be husband and wife for nearly fifteen years. The husband went to defendant, told her what was wanted and secured the certificate for the purpose of depositing it as security. He then returned to the bank of plaintiff in error, met the cashier and produced the certificate. The cashier marked on the back of the certificate, the line on which he desired defendant to sign and the husband returned to defendant, at her home, and secured her signature on the line, where indicated, and returned to plaintiff's bank where the certificate was left with plaintiff's cashier as security for the husband's debt.

Section 7855 Burns' Revised Statutes of Indiana, provides: "A married woman shall not enter into any contract of surety-ship, whether as indorser, guarantor, or in any other manner; and such contract as to her, shall be void."

In 1905, defendant in error brought this action, in replevin, to recover possession of her certificate of stock. Trial by jury and verdict in favor of defendant in error. Judgment that defendant in error recover her certificate or $3150.00 (Print Tr. p. 30). The Supreme Court of Indiana affirmed the judgment (Print Tr. pp. 120-125, and original 225 to 232, or *Citizens Bank Michigan City v Opperman*—Ind.—s. c. 115 N. E. 55).

Questions Presented.

In the complaint it was alleged in part, in substance, that the defendant in error (Mary Opperman), was the owner of and entitled to the possession of Certificate No. 385 of which plaintiff in error, (Citizens Bank of Michigan City) had possession without right and unlawfully detained the same from defendant in error (P. Tr. pp. 2-3).

Answer.

The answer was in two paragraphs, of which the first was a denial of the allegations of the complaint, and the second was a plea of estoppel. (Print Tr. p. 5). In substance, it was alleged in the second paragraph, that Henry A. F. Opperman, (husband of defendant in error), was indebted to Citizens Bank of Michigan City, Indiana, (plaintiff in error); that to secure an extension of time for payment, Mr. Opperman delivered to the bank as collateral security certificate No. 385 for fifteen shares of the capital stock of the First National Bank of Michigan City, Indiana; that while this certificate was issued to and in the name of Mary Opperman, (defendant in error), she at some time, unknown to the Citizens Bank, prior to the deposit of the certificate, signed in blank the form of assignment and power of attorney printed on the back of the certificate and delivered the same to her husband, Henry A. F. Opperman, and that he represented to the bank that he was the owner of said certificate and that the bank had no notice or knowledge that Mary Opperman claimed to have any interest in said certificate.

That the bank relied upon the fact that the certificate was assigned in blank, and was in the possession of Henry Oppermann and having no notice or knowledge of the claims of Mary Opperman, accepted the certificate as collateral security to the indebtedness of Henry Opperman. That at the time the certificate was deposited, Henry Opperman executed a collateral agreement,

"Wherefore defendant says that plaintiff should be estopped to set up any claim to said certificate as against it and demands judgment."

Demurrer.

The demurrer was sustained, and all of the evidence admissable under this special answer was admitted under the issue formed by the complaint and first paragraph of answer. The issue of estoppel was presented without special plea.

Evidence.

There were but three actors in this case, viz: Charles E. Arnt, cashier of the Citizens Bank, (plaintiff in error); Mary Opperman, (defendant in error), and Henry A. F. Opperman, (husband of Mary Opperman). At the trial, all three testified relative to the facts surrounding the pledge of the certificate of stock.

CHARLES E. ARNT testified, in part, that at the time of the transaction here in question, he was cashier of the Citizen's Bank, (plaintiff in error); had been acquainted with Mary Opperman and Henry A. F. Opperman for about twenty years;

knew them to be husband and wife, and that they lived about three or four blocks from the bank. (Print Tr. pp. 69 to 71). In September 1904, Mr. Opperman was indebted to the Citizen's Bank. I asked him for security. (Print Tr. p. 83). I cannot recall just what was said, but he brought the certificate of bank stock. I examined it; saw that the certificate was made out to his wife; knew that the debt to the bank was that of Mr. Opperman; didn't ask who owned it, and didn't telephone to her about it. (Print Tr. pp. 85-87). I noticed that the Signature of Mary Opperman, the owner, was not in the proper place, and as I wanted it properly signed by her, I made a mark where she should sign and told Mr. Opperman to have the certificate properly signed. He left the bank and returned with the certificate properly signed. It was then placed in our files as collateral security. (Print Tr. pp. 86-90).

HENRY A. F. OPPERMAN, testified in part, and in substance as follows: Mr. Arnt asked me for more security to my loan. I told him that I might get my wife's bank stock to put up as security. He said, all right, to get it, and to put it up for security. (Print Tr. pp. 48-49). I went to my home and directed my wife, Mary Opperman to sign the certificate, as I had been told to do. I took it to Mr. Arnt. He said that it was not properly signed, handed it back and told me to return it and to have it signed on the dotted line. I did so, and then Mr. Arnt took it. (Print Tr. pp. 49-51).

At the time I deposited the certificate with the bank, I received no money, and my wife received

no money. (Print Tr. p. 53). All of the money received from the bank, and for which the certificate was deposited as security was used by me in my own business. (Print Tr. pp. 53-55). I gave my wife nothing for the certificate, and she received nothing for it; the money borrowed at the bank was not used to pay any debt of my wife or to buy anything for her.

MARY OPPERMAN (Print Tr. p. 63). Wife of Henry A. F. Opperman. Married 1877. Received certificate of stock from Mother's estate. Kept it at home. My husband asked for the certificate as security to a loan of some money at the Citizens Bank. I signed the certificate. Mr. Opperman took it to the bank; returned, and said that I had not signed in the proper place. I signed again, where he indicated, and Mr. Opperman again took the certificate to the bank. No one ever gave me anything for the certificate. I subsequently collected two dividends on the stock. When I signed I knew the certificate was to be delivered to the bank.

Instruction 18, refused.

No. 18 was as follows: "I instruct you that at the time the certificate of bank stock was delivered to the defendant, the plaintiff had the legal right and legal capacity to sell, assign or give the same to her husband or any other person. And if you find from the evidence that she signed and executed a written assignment of said certificate of stock which purported by its language to sell and assign said stock, and voluntarily placed said stock and the assignment thereof as aforesaid in the possession of her husband, and her husband took the same

to the defendant and did not disclose to defendant that he was not the owner of said stock, and defendant had no actual notice or knowledge that said husband was not the owner thereof, then I instruct you that the defendant was not required to inquire as to the capacity of the plaintiff to make said contract nor can knowledge be imputed to him that the certificate was the property of the plaintiff and that her husband was pledging her property to secure the payment of his debt.

(Print Tr. p. 182).

The substance of this instruction was covered by instructions numbered 3, 15, 19 and 20 that were given at the request of plaintiff in error, and are as follows:

No. 3. "The statute providing against the wife becoming surety for the payment of another's debt was not intended to defeat legitimate transactions in which she has the right and power to engage. I, therefore, instruct you that the plaintiff had the legal right and power to make a gift to her husband of the bank stock in question or to sell it to him or assign and deliver it to him, and if you believe from the evidence that it was her intention at the time she assigned and delivered the bank stock in question to her husband to vest in him the right to use it as his own, then I instruct you that he had the right to pledge it for his debt, and if you find he did pledge it as collateral security for the payment of a valid debt owing to the defendant, then your verdict should be for the defendant.

(Print Tr. p. 15-16).

No. 15. "If you shall find from the evidence that the plaintiff signed the blank form of assignment on the back of said certificate and delivered

it to her husband without writing upon the certificate any restrictions to her transfer and that the plaintiff never gave to the defendant any notice verbal or otherwise, that she claimed to be the owner of said certificate and that defendant accepted such certificate as collateral security for the debts of the husband relying on the assignment signed by the plaintiff and upon the fact that said certificate was in the possession of her husband and that defendant had no notice or knowledge as to the ownership of the certificate except the assignment thereon and the possession of the husband, then the plaintiff is estopped to claim to own said certificate as against the defendant, and your verdict will be for the defendant.

(Print Tr. pp. 18-19).

No. 19. "If you should find from the evidence that the plaintiff was the owner of the certificate of stock in question, notwithstanding her assignment thereof in writing and it was agreed by and between her and her husband that he might pledge the same to the defendant as security for the debt of her husband, and you further find that the defendant had no actual notice of said agreement between the plaintiff and her husband and that the defendant before accepting said certificate exercised that degree of care and diligence to ascertain and know whether plaintiff was the owner of said stock as a reasonably careful and diligent person would exercise under like circumstances, then I instruct you that knowledge that the plaintiff was the owner of said stock at said time and that it was being pledged as her property cannot be imputed to defendant."

(Print Tr. pp. 19-20).

No. 20. "If you shall find that the certificate of stock sued for in this action was placed with the cashier of the defendant bank, by the husband of

the plaintiff as security for money owing to the bank by said husband, and that at the time, the said Cashier of the said defendant Bank believed that the husband of the plaintiff was the owner of said certificate and that said Cashier had no notice or knowledge of any claim or interest in said certificate belonging to the plaintiff, then you will find for the defendant."

(Print Tr. p. 20).

Instructions 21 and 22 refused.

Were as follows:

21. "I instruct you that as a matter of law that where a married woman places title to property, as in this instance a certificate of stock, in her husband, and the husband places such property in the hands of the defendant bank as collateral for money that he received from the said bank or for renewals of notes for money that he received, and that the bank had no notice of the wife's interest in the certificate of stock, that in that event your verdict should be for the defendant."

(Print Tr. p. 183).

22. "A married woman cannot claim against the holder of collateral the rights of a surety when her husband had the title to the property that he placed in the hands of the defendant as collateral, and where there is nothing to put the holder of the collateral on notice of the wife's equitable interest in the property."

(Print Tr. p. 183).

The substance of these instructions was covered by instructions numbered 9, 15, 12, 14, 20, 19 and 4 given at the request of plaintiff. These instructions, (except 15, 19, 20 supra), are as follows:

No. 9. "The Court instructs you that a married woman has, under the law of Indiana, a right to sell, assign and transfer her personal property as she may see fit and I, therefore, instruct you that at the time the plaintiff signed the bank stock certificate here in controversy that she possessed the power to sell and assign the same to her husband or any other person. Therefore, I instruct you that if you find from the evidence that she did sign the assignment on the back of the certificate in question and voluntarily and of her own accord delivered the same to her husband with full power to sell the same or pledge the same for his individual debt, and that the defendant herein accepted said certificate of purchase believing in good faith at the time it so accepted it that Henry Opperman was the owner thereof, then I instruct you that its right to the possession of the same cannot be taken away by proof of the fact, if such fact was proven, that the said Henry Opperman delivered said certificate of stock to the bank the said Henry Opperman delivered said certificate of stock to the bank as collateral security for the payment of his debt."

(Tr. p. 17).

No. 12. "Although you may find from the evidence that there was an agreement between plaintiff and her husband, that the stock certificate sued for in this action should remain the property of the plaintiff notwithstanding her assignment and that it should be hypothecated for her husband's debt; still you are instructed that the defendant is not bound by any private agreements made between the plaintiff and her husband unless the defendant had notice or knowledge of such agreements. It is not enough for the plaintiff to show that as between her and her husband she is only surety; but she must also show that the defendant either con-

tracted with her surety or that the circumstances were such as to charge the defendant with knowledge of such fact."

(Print Tr. p. 18).

No. 13. "If you shall find that at the time the stock certificate was placed in the hands of the Cashier of the bank as collateral security, the plaintiff was no longer the owner of such certificate than you will find for the defendant."

(Print Tr. p. 18).

No. 14. "In order to recover in this action the plaintiff must establish by a preponderance of the evidence, that while she was a married woman she entered into a contract of suretyship with the defendant and that the defendant had knowledge of the fact that her connection with the contract was in the capacity of a surety."

(Print Tr. p. 18).

No. 4. "It is the law in this State that a married woman may by her acts, declarations and conduct estop herself the same as any other person. And I instruct you that if you should find from the evidence that the plaintiff and her husband agreed as between them that he was to take the certificate of bank stock in question to be used as security, and that she was to remain the owner thereof, still if you find from the evidence that she assigned said bank stock in writing and that said writing on its face purported to give to her husband full power to sell and assign said certificate, and you find that she delivered said assignment to her husband and knowingly permitted him to take the same and the certificate with him to be used in procuring credit or extension of time for the payment of his debt to the defendant, and you further find that by reason of the acts and conduct aforesaid of the plaintiff the

defendant was in good faith led to accept said certificate of bank stock, under the belief that the husband, Henry Opperman, was the owner thereof and extended the time of payment of the debt of said husband, then I instruct you that the plaintiff is estopped to claim that she is the owner of said bank stock and your verdict should be for the defendant."

(Print Tr. p. 16).

Interrogatories.

The jury found that the plaintiff in error was not an innocent taker for value of the certificate in question. It returned the following answers to the following questions, among others, to-wit:

Int. 6. Was Charles E. Arnt Cashier of the defendant, Citizens Bank of Michigan City, during the years 1904 and 1905.

Ans. Yes.

Int. 10. Did Charles E. Arnt continuously during the year 1904 know that the plaintiff, Mary Opperman, and Henry A. F. Opperman were husband and wife.

Ans. Yes.

Int. 27. Did Henry A. F. Opperman in August and September, 1904, owe the defendant Citizens Bank of Michigan City approximately thirty-six hundred dollars.

Ans. Yes.

Int. 40. After the death of Mary Kreuger, was a certificate of stock of the First National Bank of Michigan City, numbered Three hundred and eighty-five (385)

issued by said Bank to the plaintiff, Mary Opperman.

Ans. Yes.

Int. 48. Did Charles E. Arnt in August or September, 1904, ask Henry A. F. Opperman to deposit with the defendant, Citizens Bank of Michigan City, some security for the debt mentioned in Interrogatory No. 27.

Ans. Yes.

Int. 52. Did Henry A. F. Opperman at his residence after being asked by Charles E. Arnt for security for his debt to the defendant bank have a conversation with the plaintiff concerning the use of the certificate of stock mentioned in Interrogatory 40 as security for his obligation to the defendant bank.

Ans. Yes.

Int. 55. If your answer to the last foregoing interrogatory is Yes, then answer this one: Did Mary Opperman when she handed the said certificate of stock to her husband hand it to him to be deposited with the defendant Citizens Bank as security for the debt mentioned in Interrogatory No. 27.

Ans. Yes.

Int. 57. Did Mary Opperman ever receive anything from anybody for the certificate of stock mentioned in Interrogatory No. 40.

Ans. No.

Int. 59. Did Henry A. F. Opperman tender the certificate of stock mentioned in Interrogatory No. 40 to Charles E. Arnt on behalf of the defendant as security for the debt mentioned in Interrogatory No. 27.

Ans. Yes.

Int. 61. If your answer to the last foregoing interrogatory is Yes, then answer this one: Did said Charles E. Arnt with either a pencil or a pen make an X at the place on the blank assignment on the back of said certificate of stock mentioned in Interrogatory No. 40 at the place where he desired Mary Opperman to sign her name.

Ans. Yes.

Int. 66. If your answer to the last above interrogatory is Yes, then answer this one: Did the said Charles E. Arnt examine the certificate again and say in substance that it was all right, and accept it as security for the debt mentioned in Interrogatory Number 27.

Ans. Yes.

Int. 70. Did Mary Opperman draw two dividends of Sixty Dollars each of the stock since the stock was pledged with the defendant Citizens Bank of Michigan City.

Ans. Yes.

Int. 72. Did Charles E. Arnt, at the time that the certificate of stock mentioned in Interrogatory numbered 40, was deposited with defendant bank, know that the

shares of stock represented thereby stood in the name of Mary Opperman on the books of the First National Bank of Michigan City.

Ans. He supposed it was.

Int. 73. Did Charles E. Arnt at any time before the commencement of this action, ask the plaintiff, Mary Opperman, who owned the certificate of stock numbered 385, mentioned in Interrogatory No. 40.

Ans. No.

Int. 74. Did Charles E. Arnt at any time before the commencement of this action ask any one who owned the certificate of stock mentioned in Interrogatory No. 40.

Ans. No.

Int. 77. Was the plaintiff, Mary Opperman, on the 19th day of September, 1904, the owner of the certificate of stock in question?

Ans. Yes.

Int. 78. Did she on that day execute her assignment thereof and deliver said certificate to her husband, together with said assignment, to be used by him as his own.

Ans. No.

Int. 81. Did the defendant at the time it accepted said certificate of stock believe that said certificate was owned by the plaintiff's husband, Henry Opperman.

Ans. No.

Int. 84. Did the defendant bank and its officers in accepting the certificate of stock involved in this suit as collateral or as security for the payment of the debt of the husband of the plaintiff have good reason to believe that Henry Opperman was the owner of said certificate.

Ans. No.

Decision of Indiana Supreme Court.

Was in part: "The record discloses that evidence was admitted upon all matters set up in this answer. It does not disclose that any offered evidence bearing upon an estoppel was included. The record shows that Appellant tendered and the court gave instructions to the jury covering fully all matters alleged as to estoppel, and covering all the evidence relating thereto. The whole trial appears to have proceeded upon the theory that in actions of replevin all defenses, including estoppel, are permissable under the general denial. As appellant was not so deprived of any advantage, Appellant was not harmed and justice to Appellant does not require that this court determine the sufficiency of said answer, nor whether estoppel is provable under the general denial in actions for replevin.

"Another ground of objection to several of the above items is that the plaintiff should not be permitted to deny the purpose and meaning of her written power of attorney and assignment of the stock. The form of the wife's signed instruments in such cases does not prevent her from showing the real fact and the actual substance, subject to the grantee's right to show estoppel. Much more positive and expressive is a signed and delivered deed of conveyance, and yet the same may be shown to be

a mortgage. *Creighton vs Hoppis, supra; Webb vs John Hancock Insurance Co.* 162 Ind. 616. Therefore, the rule that, under the construction by the Federal Courts of the Federal National Bank Act, an assignment of a certificate of National Bank stock without transfer on the books of the banking corporation is a complete transfer, vesting title in the transferee, is not in point. Even though the transfer had been made on the bank's books, the plaintiff might, inasmuch as substance and not form is regarded, show that the certificate was her property, and the completeness of the transfer, whether by assignment only or by an entry on the books of the corporation, would be pertinent only to the issue of estoppel. Where, upon all the facts being shown, it appears that the wife has absolutely and completely parted with her title by an executed arrangement, and that nothing remains in her contingent upon her husband paying his debts, her conveyance or assignment will be binding upon her, though the purpose of so doing was the actual paying of her husband's debts. *Rogers vs Shewmaker,* 27 Ind. App. 631.

It will be noted in the case above cited, and relied upon by Appellant, that the wife not only completely and without contingency or condition parted with her title at the time she executed the conveyance in question, but that the property had been actually used for the payment of her husband's debts, and that quite a number of years had elapsed before she sought to set aside the conveyance.

But where the fact is that the wife simply pledges her property to be used or returned, or released, contingent upon the default or payment by her husband of his debts, the arrangement is not an absolute or complete parting with her title, though the face of the papers signed by her may so indicate. *McCoy vs Barnes,* 136 Ind. 378.

Therefore there was no error in overruling Appellant's objections, so far as the last stated ground of objection is concerned.

The remaining assignment of error, in overruling the motion for a new trial, is that the verdict of the jury is not sustained by sufficient evidence. No point on this assignment is made in Appellant's brief. The record discloses, however, very little dispute as to any material fact, except as to whether defendant was informed by plaintiff's husband before he procured and pledged the stock that the stock belonged to his wife. There was evidence that the defendant was so informed, and this was denied by Appellant's cashier. There was sufficient evidence, pro and con, to raise an issue of fact, and this issue was settled by the jury in favor of the plaintiff. Under the well settled rule this court cannot reverse the judgment on this assignment. *Boland vs Claudell,* 181 Ind. 295 (op. 298); *Cleveland, etc. R. Co. vs Simpson,* 182 Ind. 693).

POINTS AND AUTHORITIES.

A.

No Jurisdiction to Review.

1. The record discloses that the decision of the Indiana Court was based on estoppel. No Federal question was determined. There is, therefore, no jurisdiction to review.

Wood v. Chesborough, 228 U. S. 672 s. c. 33 Sup. Ct. 706.

Ch. 9 Sec. 51 Zoline's Fed. Jur. and Proc.

2. The cause is brought up on writ of error. The validity of a law is not in question. Certiorari has been denied. The appeal should be dismissed.

Zoline's Federal Appellate Jurisdiction and P. p. 135 Sec. 3.

Sec. 237 Jud. Code as Amended Sept. 6, 1916 c. 448 Sec. 2.

ARGUMENT.

The complete decision of the Supreme Court of Indiana is set out printed transcript pp. 120 to 125, and original transcript p. 225 to p. 232, and the part in question is hereinbefore copied. It discloses that the decision is based on the defence of estoppel. The court expressly determined that whether the title to a certificate of National bank stock passed by merely signing, in blank, the blank form of assignment on the back thereof was not in point.

The answer of plaintiff in error, set out printed transcript pp. 5 and 6, discloses a defense based on estoppel. It is not alleged in this answer, as is intimated in the brief of plaintiff in error on p. 3, that "the title thereof vested in the said Henry Opperman, and that the latter had a good legal title thereto."

The jury found by it's general verdict and in answer to interrogatories numbered 55, 57, 77, 78, 81 and 84, that the certificate of stock in question was assigned as security for the debt of Henry Opperman; not for the purpose of sale or gift, and that the bank, plaintiff in error, was not misled, by the appearance of the certificate, into the belief that it was the property of Henry Opperman. Had the bank not been aware of the true ownership, then it might have been necessary to determine how much it was warranted in presuming from the appearance of the certificate. However, that is not the case presented and the Indiana court was not called upon to interpret the federal statute, or

to determine whether the state law was in conflict with the Federal law.

By reference to the printed transcript, page 128 to page 132, where the points and authorities presented, in the brief of plaintiff in error, before the Indiana court are set out, it will be seen that no Federal claim, or right, or privilege, or conflict of laws, was even hinted when this cause was before the Supreme Court of Indiana.

Under the circumstances this appeal is without merit and should be dismissed.

B.

Answering "Issue I."

In the answer in question it was alleged that when the husband of defendant in error presented the certificate in question to plaintiff in error, he represented to plaintiff in error that he was the owner of said certificate, and that plaintiff, bank, had no notice or knowledge that defendant in error had or claimed to have any interest in said certificate; that having no notice or knowledge of any claims of any interest therein on the part of Mrs. Opperman the bank accepted said certificate as collateral security to the notes of the husband of defendant in error. That Mrs. Opperman should be estopped to set up any claim to said certificate.

Every matter set up in this answer was presented, in evidence, to the jury and the issue thus presented was determined adversely to plaintiff in error. The issue was one of fact and not of law. The jury determined that the facts, necessary to support the contention of plaintiff in error, did not exist.

1. Where there is any evidence proper to go to the jury in support of the verdict, the court will not weigh the evidence.

Sec. 2 Ch. 4 Zoline's Federal Procedure.

2. Since plaintiff in error was deprived of no rights, or defense, by the ruling on the demurrer, it was not harmed, and the action of the trial court could not constitute reversible error.

Sec. 700 Burns R. S. 1914.

Sec. 407 Burns R. S. 1914.

Citizens Bank of Michigan City v. Mary Opperman, Ind. s. c. 115 N. E. 55.

3. The certificate of stock, in question, was pledged as security for the debt of Henry Opperman. It was not sold.

4. A pledge is a bailment of personal property to secure an indebtedness, in which the pledgor retains the general ownership, subject to the lien of the pledge. When the obligation is paid the pledgee is in duty bound to return the identical thing pledged.

5. In a sale there is no duty to return the article delivered. It is a contract, founded on a consideration, by which the absolute, or general, property in the subject of the sale is transferred from the seller to the buyer.

6. To constitute a sale there must be an intention to sell; an intention to buy, and a consideration.

Priest v. Hodges, 90 Ark. 131 s. c. 118 S. W. 253.

1 Mecheen on Sales Sec. 1.

7. Defendant in error was not estopped, by the form of the assignment, to show that she pledged her certificate of stock and did not sell or give it to her husband.

McCoy vs Barnes, 136 Ind. 378.

Vogel vs Leichner, 102 Ind. 55.

Webb et al vs The John Hancock Mutual Life Insurance Co. 162 Ind. 616.

Ward vs Berkshire Life Ins. Co. 108 Ind. 301.

Cupp vs Campbell, 103 Ind. 213.

Gray vs Frankhauser, 58 Oregon 423, s. c. 115 Pac. 145.

8. Where, as here, the decision of the state court rests upon non-federal questions sufficient to sustain the judgment, there is no jurisdiction in the Supreme Court of the United States to review.

Woods vs Chesborough, 228 U. S. 672. 33 Sup. Ct. Rep. 706.

P. 150 Zoline's Fed. App. Jurisdiction and Pro.

ARGUMENT ON ISSUE I.

Case Argued, Not the One Presented.

As a basis of its argument plaintiff in error assumes that defendant in error either gave, or sold, the certificate of stock in question to her husband; that the husband then pledged the certificate as security for his debt, and that plaintiff in error had no notice or knowledge that defendant in error was in any way interested in the certificate. The jury found against the existence of this assumed case. The evidence, hereinbefore set out, supports the verdict. In its opinion the Indiana court said, in part:

"The remaining assignment of error, in overruling the motion for a new trial, is that the verdict of the jury is not sustained by sufficient evidence. No point on this asignment is made in Appellant's brief. The record discloses, however, very little dispute as to any material fact, except as to whether defendant was informed by plaintiff's husband before he procured and pledged the stock that the stock belonged to his wife. There was evidence that the defendant was so informed, and this was denied by appellant's cashier. There was sufficient evidence, pro and con, to raise an issue of fact, and this issue was settled by the jury in favor of the plaintiff." (Now defendant in error).

Even now plaintiff in error does not make claim that the verdict is not sustained by the evidence. This being true the whole structure of points and argument must fall, for it is without foundation.

In answer to interrogatories numbered 27, 55,

57, 70, 77, 78, 81 and 84, hereinbefore set out, the jury found that defendant in error handed the certificate to her husband to be deposited as security for his debt; that she received nothing from the transaction; that she thereafter drew two dividends on the shares; that she did not deliver the certificate to her husband to be used as his own; that plaintiff in error did not, at the time the certificate was accepted by it, believe that the husband owned the certificate, and that it had no reason to believe that the husband, Henry Opperman, was owner of the stock.

The evidence discloses, and the jury found, that the plaintiff in error did not accept the certificate under the belief that Henry Opperman owned it, and that defendant in error did not sell or give the stock to him. It was not an innocent taker.

The statute, Section 7855 Burns R. S. 1914 provides that a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner.

What cannot be done directly, cannot be accomplished by circumvention or evasion, as is indicated in *Government etc. vs Denny* 154 Ind. 261 when the court said:

"It is an ancient legal maxim that when anything is prohibited directly, it cannot be done indirectly, or, in other words, a prohibition which the law imposes can not be evaded by any circuitous contrivance. Barton's Legal Maxims, 77; Broom's Legal Maxims, 488. Hence, in obedience to this rule, a married woman cannot evade the positive prohibition of the statute in question by vesting the

title to her in her real estate in her husband, or some other person, for the sole purpose, as alleged in the answer of appellee, of permitting it to be mortgaged to secure a debt other than her own, where the party accepting such security knows that the contrivance was resorted to for the purpose of evading the law."

Did plaintiff in error know the true situation? The evidence discloses that the husband of defendant in error was indebted to the bank; that the cashier, Arnt, asked him for security; that the husband, Mr. Opperman, told Arnt that he might get his wife's bank stock and deposit it as security; that Arnt knew that Mr. Opperman and defendant in error were husband and wife; that he told Mr. Opperman to get the stock; that Mr. Opperman left the bank to get the stock and returned with the certificate; that Arnt examined it and sent Mr. Opperman back to have Mrs. Opperman re-sign the blank assignment on the back of the certificate; that Mr. Opperman left the bank to comply with the directions of Arnt, and returned to the bank with the certificate assigned to the satisfaction of Arnt. Arnt asked no questions.

This evidence discloses that Arnt knew Mr. Opperman had no funds; that the certificate belonged to Mrs. Opperman; that the husband had nothing with which to buy it; that if Mrs. Opperman gave the certificate to her husband, it was for the purpose of using the certificate as collateral. Arnt with all of this knowledge asked no questions. The following part of the opinion in *Webb vs Hancock, etc. Co., supra,* is in point:

C.

"ISSUE II" and "ISSUE III."

The court committed no error in the rejection or admission of evidence.

1. That appellee received nothing from appellant for her certificate of stock was properly testified to by Henry Opperman as he was in a position to know.

Baltes Land, etc. Co. vs Sutton, 32 Ind. App. 14 (20) 1 Elliott on Evi. Sec. 673.

2. Appellee testified that, "He (Henry Opperman) said he wanted it (the certificate of stock) as security to a loan of some money at the Citizens Bank." The act of appellee in giving Henry Opperman possession of the certificate was competent, and what was said at that time is part of that act.

Fox vs Cox, 20 Ind. App. 61 (63 and 64).

Boone County Bank vs Wallace, 18 Ind. 82 (85).

Baker et al vs Baker, Administratrix, 43 Ind. App. 26 (28).

3. The other item of evidence objected to was also properly admitted under the res gestae last cited.

ARGUMENT.

Admission of Evidence.

It was necessary for Mrs. Opperman to prove that she had received nothing for, had not sold to, or deposited the certificate in question with the bank as security for her own debt. Her husband, Henry Opperman, was in a position to know the facts, and was asked:

> "At the time that you got his certificate from your wife and gave it to Mr. Arnt at the Citizen's Bank, did your wife receive anything from the bank for it "

The answer was "No."

The objection to the question was that it calls for an inference or conclusion and not for a fact. The question was not open to this objection as the court said in *Baltis Land Co. vs Sutton,* 32 Ind. App. 14 at p. 20:

> "A witness—Ira B. Spaulding—was asked what the consideration was that the Spauldings received or were to receive for the transfer of the property. His answer—the payment of the notes Sutton held for $3000.00—was the statement of a fact, and not a conclusion. The consideration of a written contract may be inquired into by parol."

Henry Opperman, after a talk with Arnt, during which Arnt asked for security for Opperman's debt, went to his home and made the statements complained of to Mary Opperman to secure from her

the certificate in question for the purpose of depositing the same with the appellant bank as security for his, Henry Opperman's debt.

At that time Mrs. Opperman delivered the certificate in question to her husband, Henry Opperman, to be deposited with appellant bank as security for the indebtedness of Henry Opperman. She was in her home two or three blocks from the bank. The act of Mrs. Opperman in giving Henry Opperman possession of the certificate was competent on the question of her delivery or non-delivery of possession and the purpose thereof. What was said at that time was a part of the res gestae, as said by this court in *Fox, et al vs Cox, et al,* 20 Ind. App. 61 at 63;

> "While it is well settled that a party to a suit cannot prove his own declaration, made in the absences of his adversary, to sustain his cause of action; yet the rule is declared to be that where an act is competent, so, also, are the declarations of the persons engaged in its performance and constituting a part of the thing done."

This rule is reiterated in *Baker vs Baker,* 43 Ind. App. on pp. 28 and 29, where the court said:

> "It is a general rule of law that self-serving declarations, made in the absence of the adverse party, are inadmissible in evidence * * * * * the exception to this rule being that when such declarations accompany and are connected with some act which of itself is admissible as tending to prove some question in issue, they may be given as qualifying or explaining such act as a part of the res gestae * *

> The rule and exception and principle governing the same are clearly stated in *Creighton vs Hoppis, supra,* where the court said: "It is the general rule that where an act is competent, so also are the declarations accompanying the act. It was said by Professor Greenleaf: 'But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the claimant's title, or otherwise qualifying his possession, if made in good faith, should not be received as part of the res gestae.' 1 Greenleaf, Evidence (14th ed.) Sec. 109 * * * "The rule of law is, that where it is necessary, in the course of a cause, to inquire into the nature of a particular act, and the intention the person, who did the act, proof of what the person said, at the time of doing it, is admissible in evidence, for the purpose of showing its true character."

It is apparent from the foregoing authorities that the matter objected to was well within the res gestae rule. In none of the questions to which objection is made is Mrs. Oppermon asked to state, nor did she state what she said in the absence of plaintiff in error.

The remaining testimony complained of is: "He, Henry Opperman, said he wanted it (the certificate of stock) as security to a loan of some money at the Citizens Bank," and, "And when he brought it back, what did he say to you about the way you had signed it?" and the answer "That I hadn't signed it in the right place."

When Mrs. Opperman signed her name upon the back of the certificate in question she placed her signature below the line intended for the signature

of the witness to the signature of the assignor, so that when Henry Opperman presented the certificate at the bank cashier, Arnt, it was doubtful whether the power of attorney and printed assignment had ever been executed in blank. Arnt objected to the receipt of the certificate in that form and made an "X" on the back of the certificate at the place where he desired Mrs. Opperman to sign and Henry Opperman then returned with the certificate to the bank, and made the statement to Arnt that is objected to, whereupon Mrs. Opperman signed the certificate, at the point designated by Arnt, and returned it to Henry Opperman who returned with it to the bank and completed the transaction. The act of Mrs. Opperman in signing and delivering the certificate to Henry Opperman was competent and what Henry Opperman said at that time was within the res gestae as above set out. Furthermore the transaction was in effect a case of Arnt sending Henry Opperman to get Mary Opperman to secure his, Henry Opperman's debt, and Henry Opperman carried out Arnt's instructions.

Plaintiff in error makes the point that although the evidence complained of may have been admissible still it was not proof of the truth of the facts related and that Henry Opperman was estopped to deny the title that he had already conveyed.

It is admitted (brief of plaintiff in error p. 51) that the purpose of the testimony was to bring notice to Arnt that the certificate belonged to Mrs. Opperman. The statement made by Mr. Opperman may have been false, but still Arnt having

heard the statement made by the man that was depositing the certificate was bound to make inquiry, and on failure to investigate the truth of the statement of Mr. Opperman, was charged with notice of the facts that investigation would disclose. He could not close his eyes in the face of the statement of Mr. Opperman and then, as now, he heard to say that what Opperman said was no proof of the existence of the fact stated. It was notice that thereafter removed Arnt from the position of the innocent.

Opperman never pretended to Arnt that he was depositing his own certificate. Arnt knew, as hereinbefore shown that Opperman was depositing the certificate of his wife. This being the case Opperman, in his testimony, did not vary, add to, or change, any title or contract, warranted or made by him. Plaintiff in error seems to forget that an assigned certificate does not alone pass title; that there must also be a delivery, and that the purpose of the delivery may be shown except as against an innocent purchaser. Arnt was not innocent.

D.

"ISSUE IV" and "ISSUE V."

Refer to giving instructions 5 and 6, and in refusing instructions 18, 21 and 22.

The points made are:

a. The court instructed relative to estoppel *in pais,* (Instructions 5 and 6), whereas the

answer set up estoppel by contract (Instructions 18, 21, 22 refused).

b. Mrs. Opperman was bound by estoppel *in pais.*

1. Plaintiff in error, in instructions 15, 19, 20 and 12 requested the court to instruct the jury concerning the law governing the defense of estoppel *in pais.* It cannot, therefore, complain that the court instructed the jury on that subject.

Pittsburg C. C. & St. L. Ry. Co. vs O'Connor, 171 Ind. 686 (700).

2. Ordinarily facts constituting estoppel, in order to be available in a case, must, under the Indiana code, be especially pleased, and be proven by the party asserting this defense.

Webb vs John Hancock etc. Ins. Co. 162 Ind. 616 (630).

Krieg vs Palmer Nat. Bank, 51 Ind. App. 35.

Smith vs McDonald, 49 Ind. App. 464.
Citizens Bank vs Opperman, Ind., 115 N. E. 55.

a. But estoppel in pais is available as a defense, even though not pleaded, where the party against whom such defense is urged waives the formality of a special answer.

Price et al vs Hallett, 138 Mo. 561 s. c. 38 S. W. 451 (455).

McDonnell et al vs De Soto Sav. & Bldg. Association (Mo.) 75 S. W. 438.

Empson Packing Co. vs Vaughn (Colo) 59 Pac. 749.

3. The burden of proof is upon the party who, if special pleading is required, would be bound to allege the particular matter sought to be proven.

Fay vs Burditt, 81 Ind. 433 (444).

4. "In an action of replevin where the only answer is the general denial, the plaintiff, under such issue, must show his right of possession, and if the defendant attempts to prove his right of posession the burden under such issue is upon him." (Sylabus).

Waterbury vs Miller, 13 Ind. App. 197 (209 and 210).

Stewart vs Gwynn, 41 Ind. App. 320 (324).

Schulenberg vs Harriman, 21 Wall. 44 (59).

5. It is not error to instruct the jury that under certain contingencies the burden of proof shifts.

Cunningham vs Huff, 118 Ind. 263 (265).

Pittsburg, etc. Ry. Co. vs Sponier, 85 Ind. 165 (171).

6. The substance of instructions 18, 21 and 22 was covered by instructions numbered 3, 4, 9, 11, 13, 14, 15, 19 and 20 that were given at the request of plaintiff in error.

a. It is not error for the trial court to refuse to give an instruction that is substantially covered by the instruction given.

Mortimer vs Daub, 52 Ind. App. 30 (39).

Baltimore & Ohio S. W. R. Co. vs Reed, 50 Ind. App. 220 (222).

New York, Chicago, etc. R. Co. vs Flynn, 41 Ind. App. 501 at 503.

7. Instruction 18 is defective in that it contravenes the rule that less than actual knowledge would be sufficient to charge plaintiff in error with notice of such facts as inquiry would have disclosed.

Webb vs John Hancock, etc. Ins. Co. 162 Ind. 616 (635).

8. Instructions numbered 21 and 22 are ambiguous and misleading, in that it is assumed, in each, that title to the certificate was placed in the husband, by the wife; and then the instructions assumed to state the law to be, that if there was nothing to give the bank notice of the wife's equitable interest, then the wife could not recover the certificate.

9. The jury found that Mrs. Opperman did not give, or sell, the certificate to her husband and that Arnt was not misled. There was, therefore, no error in refusing instructions, in any event.

Town of New Castle vs Grubbs, 171 Ind. 482 (499).

ARGUMENT.

Plaintiff in error complains of instructions 5 and 6 on the ground that the court gave instructions as to facts, "that would constitute an estoppel *in pais,* instead of instructing as to what facts constitute estoppel by contract."

Instructions 12, 15, 19 and 20 (Print Tr. pp. 18, 19 and 20, and hereinbefore set out) were given at the request of plaintiff in error. (See courts certificate print tr. p. 21 and orig. tr. p. 40). In these instructions the court, at the request of the plaintiff in error, instructed relative to estoppel *in pais.* Plaintiff in error cannot, therefore complain even were it true, which it is not, that the answer did allege estoppel by contract. *Pittsburg etc, R. Co. vs O'Connor* 171 Ind. 686, (700).

It is elemental that the burden of proof is upon the party who, if special pleading is required, would be bound to allege the particular matter sought to be proven. In Indiana estoppel must be especially pleaded, if the special plea is not waived. And the burden of proving an estoppel rested with plaintiff in error. *Morgan vs Hoadley,* 156 Ind. 320.

If as plaintiff in error, now insists, the answer stated an estoppel by contract, then it should not have asked the trial court to instruct relative to estoppel *in pais*; and having submitted instructions relative to two theories of one paragraph of answer, it cannot complain that the court elected to adopt either of the two theories.

However, as shown by the instructions set out

verbatim in the early part of this brief, the substance of the instructions refused, insofar as they were correct, was given in other instructions. Instruction 18 omits the element of imputed knowledge, and is in conflict with the instructions given covering that element. Instructions 21 and 22 are peremptory; assume that title to the certificate was placed in Mr. Opperman, which is not the fact, as the evidence shows and the jury found in answer to interrogatories numbered 55 and 78.

Aside from the foregoing, it must be apparent that the answer stated a defense of estoppel *in pais,* and not estoppel by contract. Estoppel by contract is of two sorts: (1) estoppel to deny the truth of facts agreed upon and settled by force of entering into the contract, and (2) estoppel arising from acts done under or in performance of the contract. The evidence discloses no agreement whatever concerning the title to the certificate being in any other than Mrs. Opperman. The answer discloses no such agreement.

It will probably not be seriously contended by the bank that it falls within the second class. To this class belong those cases in which, for instance, a tenant is estoppel to deny the title of his landlord. To this class belong the cases, "One who takes posession in subordination of another's title is ordinarily estopped as against that other to deny that title.

The answer alleges that Mrs. Opperman clothed her husband with the apparent ownership of the certificate; that the bank was misled thereby and accepted it as security in ignorance of the facts. This is estoppel *in pais.* 16 Cyc. 804.

Conclusion.

Plaintiff in error, in its brief, page 55, states in conclusion, that:

> "The blank assignment made by the defendant in error upon the delivery of the certificate to her husband, * *, gave to her said husband the *apparent authority* to deal absolutely with the stock; *and a pledge in good faith, without notice* of any infirmity in her husband's title, is entitled to have the proceeds of the shares applied on its debt" (our italics).

This statement discloses the infirmity of the position of plaintiff in error. The certificate appeared to belong to Henry Opperman, because the blank assignment was executed and it was in the possession of Mr. Opperman. The appearance of the thing didn't fool Arnt. He knew who owned the certificate. Hence what the rights of misled and innocent pledges might be is beside the question. The controlling question is, Did Arnt know, or should he have known who owned the certificate when it was pledged? The answer is; He knew. This being the case, Mrs. Opperman is not estopped to re-claim her certificate.

We submit, therefore, that the judgment of the Supreme Court of the State of Indiana should be affirmed.

Samuel Parker

Attorneys for Defendant in Error.

Received a copy of the brief therein this.....

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Attorneys for Plaintiff in Error.